(25,377)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 547.

ROME RAILWAY & LIGHT COMPANY, APPELLANT,

vs.

FLOYD COUNTY, GEORGIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 6, 1916.

1

Original Bill in Equity.

To the Judges of the District Court of the United States for the Northern District of Georgia, Northwestern Division:

The Rome Railway & Light Company, a corporation created and existing under the laws of the State of Georgia, having its principal office and place of business in Floyd County, Georgia, said District, brings this its bill of complaint against the County of Floyd, a municipal corporation of the State of Georgia, and the Board of Commissioners of Roads and Revenues of said County, composed of the following persons, to-wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin and W. N. Horton; all of said defendants being citizens of the State of Georgia, residing within said District, and thereupon, your orator complains and says:

1st. As hereinafter shown, defendants are threatening and about to deprive your orator of its property, without due process of law, and to deprive it of the equal protection of the laws, all in violation of rights secured to it by the Constitution of the United States, by putting into operation an Act passed by the Legislature of Georgia approved August 15th, 1914, a copy of which Act is hereto attached, marked Exhibit "A," which Act, if put in operation as defendants propose and threaten to do, will impair the obligations of a contract right or franchise owned by your orator as hereinafter set forth.

2nd. Your orator says that by due and proper conveyances from the Rome Street Railroad Company and from its successors in title, it is the transferee and owner of all of the rights, powers, franchises and privileges granted to said Rome Street Railroad Company and its successors, by the State of Georgia, and by the acts and acquiescence of the County of Floyd and of its Board of Commissioners of Roads and Revenues and of the City of Rome, Georgia, said rights, powers, franchises and privileges being first granted to said Rome Street Railroad Company, in the following manner to-wit: By sundry acts passed by the Legislature of Georgia, and especially by an act approved December 12, 1884, the caption of which is as follows:

2 "An Act to incorporate The Rome Street Railroad Company and to define its powers, the mayor and council of the city of Rome having given its consent to the authority hereinafter granted, said consent being evidenced by a certified copy of the official action of said mayor and council, exhibited in both branches of the Legislature before the passage of this bill."

By said Act, as construed by the Supreme Court of Gerogia, said Legislature granted to said Rome Street Railroad Company power and authority to lay out, construct and equip, use and employ street railroads in the City of Rome and Floyd County, over certain streets specified in said Act, including the bridges then spanning the Etowah and Oostanaula Rivers within said corporate limits, on what was then known as Howard Street, now Second Avenue, Bridge Street, now Fifth Avenue, and Broad Street.

At the time said Act was passed and approved, Howard Street, Bridge Street, and Broad Street, therein mentioned, were all public streets of the City of Rome, Georgia; and said two rivers, at the points where said bridges are now located, were within the corporate limits of said City, and the bridges across said rivers formed a continuation of the said streets respectively across said rivers; and it was expressly adjudged by the Supreme Court of Georgia in the case of County of Floyd v. Rome Street Railroad Company, 77 Ga. 614, that said bridges were a part of said streets respectively, and that as to the bridge across the Etowah River, the Rome Street Railroad Company, which was the predecessor in interest and title of your orator, had under said Act a franchise and a vested right to lay its tracks and operate its cars over said bridge, or any renewal thereof, as a part of Howard Street.

Said Act of incorporation provided that said Company might convey on its lines passengers or freight as the exigencies of the business community and public wants may require, and charge reasonable and just rates for such transportation.

Your orator alleges as follows; that

At the time of the passage of said Act, said bridges belonged to the County of Floyd, and said County placed the same under the control and management of the authorities of the City of Rome. Said Rome Street Railroad Company, which was being formed
applied to the municipal authorities of the City of Rome for
3 permission to lay its rails and run its cars over said bridges.
upon the making of this application by said Street Railroad Company, the City authorities applied to the Board of Commissioners of Roads and Revenues of the County of Floyd for their consent to the use of said bridges, as contemplated by said company. The Board of Commissioners of Roads and Revenues of said County, thereupon, passed an order granting such consent to the use of said bridges. Immediately after the passage of said Act, said Rome Street Railroad Company laid its tracks and began the running of its cars over streets in the City of Rome including the bridge across the Etowah River on what was then known as Howard Street, now known as Second Avenue, acting under and by virtue of said Act of the Legislature of the State of Georgia, and the assent as above stated given by the City of Rome and County of Floyd, and subsequently laid its tracks and operated its cars over the bridge across the Etowah River on Broad Street, and over the bridge across the Oostanaula River on what was then known as Bridge Street, now known as Fifth Avenue, in said City of Rome, Georgia.

Acting on the authority aforesaid, said Rome Street Railroad Company, and its successors in title have constructed tracks on and over said bridges and have run cars continuously until the present time, and have expended large sums of money in the construction and extension of lines beyond said bridges from the City of Rome, as hereinafter set forth, which said extensions can be reached only on and over said bridges respectively.

Since the year 1906 complainant has been running its cars over all of said bridges, propelling the same by electric power, and is at this time operating its cars through the City of Rome and over said bridges for a distance of approximately one mile beyond the bridge on Second Avenue across the Etowah River, and approximately five miles beyond the bridge on Broad Street across the Etowah River, and approximately two miles beyond the bridge on Fifth Avenue, across the Oostanaula River; all of said lines being connected with each other, passing through the City of Rome, forming one system of street railroad operating in the City of Rome and within the County of Floyd, serving the public as a street railway system for the carrying of passengers for hire.

4 3rd. Your orator says, it has heretofore executed a mortgage, or deed of Trust, to the Columbia Trust Company as Trustee, a corporation of the State of Kentucky, with its principal office at Louisville, Kentucky, dated January 1st, 1909, to secure $750,000.00 of bonds, known as "Refunding and Consolidated Bonds"; $500,000.00 of said bonds were left in the hands of said Trustee to pay off an equal amount of outstanding issue of bonds secured by a mortgage previously executed by your orator and being a first lien upon all of the property owned by your orator. The balance of said bonds, to wit: $250,000.00 were duly certified by said Trustee and by this orator sold upon the open market to divers and sundry purchasers. All of said bonds are payable to bearer and outstanding. Your orator is unable to state who are the present holders thereof. The proceeds arising from the sale of said bonds have gone into the construction, deveolpment and maintenance of the railway system and electric light plant owned and operated by your orator in and through the City of Rome and beyond said bridges into said County of Floyd.

4th. Your orator says that as provided by Section 8 of said Act of the Legislature of Georgia approved August 15th, 1914, the Board of Commissioners of Roads and Revenues of said County of Floyd requested the Ordinary of said County to call a special election referring to the people of said County the question of adopting or rejecting said Act. Said Ordinary called the election as requested, which was held and resulted in the adoption of said Act and the same was certified and declared by said Ordinary, as provided in said Section of said Act. Afterwards, said Board of Commissioners of Roads and Revenues of said Floyd County and the Mayor and Council of the City of Rome, passed resolutions accepting the terms of said Act, as provided in Section 7 of said Act.

5th. Your orator says that on May 3rd, 1915, as provided by Section 6 of said Act, the Board of Commissioners of Roads and Revenues of Floyd County, caused its chairman to publish notices in the newspaper in Rome, Georgia, in which the Sheriff's sales are advertised, that they would on June 16th, 1915,

begin the work of tearing down and rebuilding the bridge
5 across the Oostanaula River on Fifth Avenue, and *and* also
the bridge across the Etowah River on Second Avenue, and also the bridge across the Etowah River on Broad Street, all in the City of Rome, Georgia; copies of which several notices so published are hereto attached, marked "Exhibit B" and made a part hereof. In said respective notices the estimated cost of tearing down and removing the three old bridges, and the construction of three new bridges in lieu thereof, was stated, and as stated, aggregated the sum of $260,000.00.

On May 13th, 1915, said Board of Commissioners of Roads and Revenues passed three several resolutions, a copy of which is hereto attached marked "Exhibit C" and made a part of hereof, in and by which resolutions respectively, it was recited that the County of Floyd, acting under the authority of the Act of the Legislature aforesaid, had decided to remove each of the three bridges above mentioned, and to construct a new bridge at each of said sites, and it was further ordered that your orator shall and will be required to pay to the Treasurer of the County of Floyd one-third of the actual cost of removing each of said old bridges and erecting new ones in lieu thereof, and further providing that said sums respectively must be paid before your orator would be allowed to place any tracks, wires or equipment, or operate any cars on or over said new bridges when they are finished, and that such payment, when made, should entitle your orator to only such rights and privileges as are provided in the Act aforesaid.

6th. And your orator says that if said Act, especially if Sections 1, 2, 3 and 4 of said Act of the Legislature of Georgia approved August 15th, 1914, should be carried into effect, in the manner proposed and threatened by the Board of Commissioners of Roads and Revenues of said Floyd County, the value of its property rights over said streets and said bridges as a part of said streets, will be substantially destroyed, and if its rights to lay tracks and operate cars on or over said bridges, or either of them, or to place wires and equipment and operate the same on and over said bridges, is revoked and repealed, so far as the same may apply to any future bridges constructed under said Act, or any other law, its property will be taken without due process of law, and its franchise and contract rights over said bridges will be impaired by virtue of
6 the passage of said Act of the Legislature of Georgia.

7th. And your orator says that if the provisions of Sections 1, 2, and 3 of said Act of the Legislature of Georgia approved August 15th, 1914, becomes operative and are carried into effect in the manner proposed and threatened by the Board of Commissioners of Roads and Revenues of said Floyd County, Georgia, the same will revoke the special privileges and immunities granted to your orator by the State of Georgia, in a manner to work injustice to its corporators and creditors, contrary to the provisions of Article 1, Section 3, Paragraph 3 of the Constitution of the State of Georgia, and will impair the obligations of your orator's contract as contained in the franchise and charter granted by the State of Georgia to the Rome Street Railroad Company and now owned by your orator.

8th. And your orator says that if the provisions of Section 4 of said Act of the Legislature of Georgia, approved August 15th, 1914, are carried into effect in the manner proposed and threatened by the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, and your orator is required, as a condition precedent to the laying of tracks, placing of wires and operating cars on and over said bridges, to pay to said County a sum equal to one-third of the actual cost of the building of said bridges, this will be a taking of your orator's property without due process of law, for that one-third of the cost of tearing down and reconstructing said bridges would aggregate $86,666.66 as per the estimate of the cost thereof made by said Commissioners of Roads and Revenues of Floyd County, Georgia, which said amount cannot be paid from the receipts derived from the operation of said street railroad and leave a sum sufficient to pay the operating expenses and a reasonable return to your orator for its investment in said Street Railway System. That the repeal of your orator's rights to cross said bridges and the requirement of the payment of one-third of the cost of said bridges would so destroy the value of your orator's property as that it could neither borrow money, nor earn the money with which to pay said one-third for said bridges, and your orator is not possessed of a sum of money, or property sufficient to pay said one-third of the cost of building said bridges and would have no means to procure the same, 7 under the conditions herein stated, for which reason it would be deprived of its property and the use thereof and the value of its property would be substantially destroyed, without due process of law.

Your orator furthermore says that, if the provisions of said Section 4 of said Act are carried into effect, in the manner proposed and threatened by the Board of Commissioners of Roads and Revenues of Floyd County, and your orator is not permitted to lay its tracks, and place its wires, and operate its cars over said bridges without the payment of one-third of the cost thereof, the said Act would in effect deprive your orator of the equal protection of the laws, in that it would impose upon your orator as a charge, or an assessment, or a tax, for the reconstruction of said bridges respectively, largely more than its proportionate part as a taxpayer and citizen of said County of the burden of tearing down and reconstructing said bridges for the public benefit.

To the end that your orator may obtain the relief to which it is entitled in the premises it now prays the Court to grant it due process by subpœna directed to said County of Floyd in the State of Georgia, and to said Board of Commissioners of Roads and Revenues of said County, composed of the following persons, to-wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. G. Griffin and W. N. Horton defendants hereinbefore named, requiring and commanding each of them to appear herein and answer but not under oath, the same being expressly waived, to the several allegations in this your orator's bill contained.

And your orator further prays that upon a final hearing it be ordered and decreed, that Section 1 of said Act approved August 15th, 1914, be held and declared to be null and void so far as it attempts to put all right, title and interest, together with full and complete jurisdiction over and control of said bridges in said County of Floyd, to the exclusion of your orator's right to cross said bridges with its tracks, wires and other equipment necessary for the operation of its street railway cars over said bridges.

8 And that Section 2 of said Act approved August 15th, 1914, be held and declared to be null and void, in so far as it attempts to revoke and repeal your orator's right to lay tracks and operate cars on and over said bridges, or either of them, or to place wires and equipment and operate the same on and over said bridges, so far as the same applies to any future bridges hereafter constructed under said Act or any other law, unless your orator will conform to the terms and conditions required by said County authorities.

And that Section 3 of said Act, be held and declared to be null and void, in so far as it attempts to authorize said County of Floyd to require your orator to remove its tracks, wires and other equipment from said bridges, except for the purpose of allowing new bridges to be built, with the right in your orator afterwards to replace its tracks, wires and other equipment thereon.

And that Section 4 of said Act be held and declared null and void in so far as it attempts to confer upon the County authorities of said County of Floyd the power to require your orator, as a condition precedent to the laying of tracks, placing of wires, and operating cars on and over said bridges, that it pay to the Treasurer of said County of Floyd, a sum equal to one-third of the actual cost of the building of said bridges or any other sum as a charge or payment for the use of said bridges when reconstructed.

And your orator further prays that said defendants be enjoined from putting into effect any of the provisions of said Act approved August 15th, 1914, herein sought to be declared void, and be further enjoined from denying or questioning the rights secured to your orator under its franchises and contracts, hereinbefore set out, to use said bridges, when reconstructed, in the operation of its street railway, free of any charge, assessment, or tax for such use, and from interfering with your orator in the exercise of such rights, and be further enjoined from attempting hereafter to collect of or from your orator one-third the cost of reconstructing said bridges, or any sum, as a charge for the use thereof. And your orator further prays that such other and further relief be granted it as may be just and equitable.

L. H. COVINGTON,
DEAN & DEAN,
Solicitors for Complainant.

9 STATE OF KENTUCKY,
County of Jefferson, ss:

In person appeared S. S. Bush before the undersigned official, who is authorized to administer oaths in said State and County, and after being duly sworn deponent says:

That he is Vice President and General Manager of said complainant company, and in charge of its actual operation, and knows the facts touching the statements and allegations in the foregoing bill of complaint, and says that the same are true.

S. S. BUSH.

Subscribed and sworn to before me this 25th day of May, 1915, by S. S. Bush. My commission expires February 13, 1916.

JOSEPH L. LOUGHMILLER,
Notary Public, Jefferson County, Kentucky.

10 "EXHIBIT A."

An act to vest in Floyd County full and complete title, jurisdiction over and control of the following bridges within the City of Rome, In Floyd County, Georgia, to wit: Second Avenue bridge spanning the Etowah River; Broad Street bridge spanning the Etowah River, and Fifth Avenue bridge spanning the Oostanaula River. To revoke any and all permits granted by legislative or municipal or county authority to any street railway company, electric light, telegraph, telephone or gas company, to lay tracks and operate cars on and over said bridges or to place wires or pipes and operate the same on and over said bridges; to repeal all franchises heretofore granted to all such public service corporations to operate on and over said bridge, whether granted by legislative, county or municipal authority upon condition. To authorize the County authorities of Floyd County to condemn and remove the present bridges and to build new bridges at the same points, and to authorize the county to acquire the necessary lands for the purpose of constructing bridges wide enough to meet the demands of public travel; to authorize said county to require of any street railway company or electric railway company, desiring to lay its tracks on and operate its cars over said bridge, or either of them, to pay to said county a sum equal to one-third of the actual cost of building either of said bridges, before any company shall be allowed to lay tracks, place any wires or other equipment or operate any cars on or over such bridge or bridges, and to fix the rights of such corporation by reason of such payments; to grant to the county authorities of Floyd county the exclusive right and jurisdiction to grant permission and franchises to persons, firms and corporations, exercising public service functions, to operate on or over said bridges, and to prescribe the terms and limitations of such grants; to provide that any person, firm or corporation, desiring to contest the validity of this Act, shall do so by injunction proceedings before the beginning of the work of tearing down and removing the old bridges and not otherwise; to provide for the acceptance of this Act by the county and city authorities, and for other purposes.

Section 1.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this act, all rights, title and interest in the following bridges within the City of Rome, said county, to wit: Second Avenue Bridge spanning the Etowah River; Broad Street Bridge spanning the Etowah River; and Fifth Avenue Bridge, spanning the Oostanaula River together with the full and complete jurisdiction over and control thereof, shall be vested in said County of Floyd, and be exercised by the county authorities of said County.

Section 2.

Be it further enacted, that all permits and franchises heretofore granted, either by the General Assembly, the municipal authorities of the City of Rome, or County authorities of Floyd County, to any street railway company, electric light, telephone, telegraph or gas company to lay tracks and operate cars on or over said bridges, or either of them, or to place wires, pipes and equipment, and operate the same on and over said bridges, are hereby revoked and repealed so far as the same applies to any future bridges hereafter constructed under this or any other law unless the said companies will conform to the reasonable terms and conditions required by the county authorities.

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Section 3.

Be it further anacted, that said County of Floyd is hereby authorized to condemn and remove the present bridges and to build new bridges at the same site and is allowed to acquire any necessary lands for the purpose of constructing bridges of sufficient width to meet the demands of the public travel, and all public service corporations, street railway companies, telegraph, telephone, light and gas companies, are required, when notified to do so, to remove all tracks, wires, pipes and other equipment from said bridges and each of them, as required by the county authorities.

Section 4.

Be it further enacted, That the county authorities of said county are hereby given the exclusive right and jurisdiction to grant permission and franchises to persons, firms and corporations, exercising public service function, to operate on and over said bridges, and to place railway tracks, thereon and to operate cars on and over said bridges and to prescribe the terms and limitations of such grants; and the county authorities of said county are authorized to require of any street railway company or electric railway company as a condition precedent to the laying of tracks, placing wires and operating cars on or over said bridges, that it pay to said county a sum equal to one-third of the actual cost of the building of said bridges, and the sum shall be paid to the Treasurer of said county before any such company shall be allowed to lay any tracks or place any wires or other equipment or operate any cars on or over such bridge, but any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the Board of Commissioners and the terms of this Act.

Section 5.

Be it further enacted, that any railway company, electric railway company or other public service corporations, paying the sums required under and by the preceding section shall acquire only the same rights to operate on and over said bridges as they may have had on and over the streets leading to and from such bridges, and shall not be deemed to have any right, title or interest in such bridges or control over the same.

Section 6.

Be it further enacted, that any person, firm or corporation desiring to contest the validity of any part of this Act, shall do so by injunction proceedings before the beginning of the work of tearing down and removing of such bridges, and not otherwise. Notice shall be given all persons, firms and corporations of the time when work is to begin by publishing a notice thereof by the Chairman of the Board of Commissioners in the newspaper in which Sheriff's sales are advertised. Said notice shall state the time when the work is to commence as near as practicable, and the estimate of the cost of each bridge. Said notice shall be published once a week for two weeks. The last publication to be at least 30 days before work is to begin. Any person, firm or corporation desiring to object to any terms of this bill, or to any change that may be made thereunder or the levy of any tax or any assessment or charge for building the bridge or bridges, shall file an injunction at least twenty days before the date the work is advertised to begin against the county stating the objections to the bill, which shall be heard as other injunctions are heard. And the work shall not begin until said injunction suit is finally determined.

Section 7.

This Act shall not go into effect until the Board of Commissioners of Roads and Revenues of Floyd County and the Mayor and Council of the City of Rome shall have both passed resolutions accepting the terms of this Act.

12

Section 8.

Be it further anacted, that the Board of Commissioners shall before adopting the resolution putting this Act into effect, request the Ordinary to call a special election referring to the people of Floyd County, the question of adopting or rejecting said Act. It shall be the duty of the Ordinary to call said election not less than 15 nor more than 30 days after receiving such request. Said election shall be called as special elections are called and those voting for such Act to go into effect shall have printed or written on their ballot the words, "For Bridge Act." Those opposed shall have "Against Bridge Act." The Ordinary shall consolidate the vote, and shall certify the result to the Board of Commissioners, who shall declare the result, and shall act accordingly.

Section 9.

Be it further enacted, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

Approved August 15, 1914.

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Exhibit "B."

Bridge Building Notice.

State of Georgia,
Floyd County:

Notice is hereby given that the Commissioners of Roads and Revenues of Floyd County, Georgia, will, on June 16th, 1915, begin the work of tearing down and rebuilding the bridge across the Oostanaula river, on Fifth Avenue, in the city of Rome. The estimated cost of tearing down and removing the old bridge and the construction of a new bridge is $84,500.00.

This notice is given by order of said Board of Commissioners of Roads and Revenue of Floyd County, Georgia, pursuant to Section 6 of the Act approved August 15, 1914, as appears in the Acts of the Georgia Legislature of 1914, pages 271 to 275, inclusive.

This May 3rd, 1915.

5-4-12t

J. G. POLLOCK, *Chairman.*

Bridge Building Notice.

State of Georgia,
Floyd County:

Notice is hereby given that the Commissioners of Roads and Revenue of Floyd County, Georgia, will, on June 16th, 1915 begin the work of tearing down and rebuilding the bridge across the Etowah river, on Second Avenue, in the city of Rome. The estimated cost of tearing down and removing the old bridge and the construction of a new bridge is $88,800.00.

This notice is given by order of said Board of Commissioners of Roads and Revenue of Floyd County, Georgia, pursuant to Section 6 of the Act approved August 15, 1914, as appears in the Acts of the Georgia Legislature of 1914, pages 271 to 275, inclusive.

This May 3rd, 1915.

5-4-12t

J. G. POLLOCK, *Chairman.*

Bridge Building Notice.

STATE OF GEORGIA,
Floyd County:

Notice is hereby given that the Commissioners of Roads and Revenue of Floyd County, Georgia, will, on June 16th, 1915, begin the work of tearing down and rebuilding the bridge across the Etowah river on Broad Street in the city of Rome. The estimated cost of tearing down and removing the old bridge and the construction of a new bridge is $86,700.00.

This notice is given by order of said Board of Commissioners of Roads and Revenue of Floyd County, Georgia, pursuant to Section 6 of the Act approved August 15, 1914, as appears in the Acts of the Georgia Legislature of 1914, pages 271 to 275, inclusive.

This May 3rd, 1915.

5-4-12t

J. G. POLLOCK, *Chairman.*

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EXHIBIT "C."

Meeting of May 13th, 1915.

Call meeting of the Commissioners of Roads and Revenue of Floyd Co. met at the call of the Chairman; present, J. G. Pollock, C. M. Young, J. S. Davis and C. L. Conn.

The following orders were unanimously passed:

The County under the authority of the Act of Legislature of 1914 authorizing it to do so, having decided to remove the present bridge across the Etowah River on Second Avenue, within the City of Rome, and to construct a new bridge at said site. It is ordered that the Rome Railway and Light Company, now operating an electric street railway line on and over said bridge, shall and will be required to pay to the County one third of the actual cost of removing the old bridge and erecting a new one at the said site, which sum shall be paid to the County Treas. before said Company shall be allowed to place any tracks, wires, equipment or operate any cars on and over said new bridge when it is finished.

Such payment when made shall entitle the said Railway Company to only such rights and privileges as provided by the Act of the Legislature aforesaid.

The following order was unanimously passed:

The County under the authority of the Act of Legislature of 1914 authorizing it to do so, having decided to remove the present bridge across the Etowah River on Broad street, within the City of Rome, and to construct a new bridge at said site, it is ordered that the Rome Railway and Light Company now operating an electric street railway line on and over said bridge shall and will be required to pay to the County one third of the actual cost of removing the old bridge and erecting a new one at said site, which sum shall be paid to the County Treasurer before said Company shall be allowed to place any tracks, wires, equipment or operate any cars on and over said new bridge when it is finished.

Such payment when made shall entitle the said railway Company to only such rights and privileges as provided by the Act of Legislature aforesaid.

The following order was unanimously passed:

The County under the authority of the Act of Legislature of 1914 authorizing it to do so, having decided to remove the present bridge across the Oostanaula River on Fifth Avenue within the City of Rome *at* to construct a new bridge at said site, it is ordered that the Rome Railway and Light Company now operating an electric car line on and over said bridge shall and will be required to pay to the County one third of the actual cost of removing the old bridge and erecting a new one at said site, which sum shall be paid to the County Treasurer before said Company shall be allowed to place any tracks, wires, equipment or operate any cars on and over said new bridge when it is finished.

Such payment when made shall entitle said Railway Company to only such rights and privileges as provided by the Act of the Legislature aforesaid.

Minutes of this meeting approved and ordered recorded.

Meeting adjourned.

J. G. POLLOCK, *Ch'm.*

M. B. EUBANKS, *Cl'k.*

U. S. District Court. Original Bill Filed in Clerk's Office this May 26, 1915. O. C. Fuller, Clerk, by J. C. Printup, Deputy.

15 *Subpœna.*

UNITED STATES OF AMERICA,
Northwestern Division of the
Northern District of Georgia:

In Equity.

ROME RAILWAY & LIGHT COMPANY, Complainant,
and
FLOYD COUNTY, GEORGIA, and THE BOARD OF COMMISSIONERS OF Roads and Revenues of said County Composed of the Following Persons, To wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin, and W. N. Horton, Defendants.

The President of the United States to Floyd County, Georgia, and the Board of Commissioners of Roads and Revenues of said County, composed of the following persons, to wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin, and W. N. Horton:

For certain causes offered before the Judge of the District Court of the United States for the Northern District of Georgia, in equity, you and each of you are hereby commanded and strictly enjoined, that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear at the Clerk's office of the said Court, in the City of Rome, Georgia, within twenty days from the day of the date hereof, to answer to those things which shall then and there be objected to you by the bill of complaint of Rome Railway & Light Company and to do further, and receive what the said Court shall have considered in this behalf, and this you may in no wise omit, under penalty of Five Hundred Dollars; and have here this writ.

Witness the Honorable Wm. T. Newman Judge of the District Court of the United States for the Northern District of Georgia, this 26th day of May, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

[SEAL.]

O. C. FULLER, *Clerk,*
By J. C. PRINTUP,
Deputy Clerk.

MEMORANDUM.—The Defendants each of them are required to file their answers or other defenses in the suit above stated, in the clerk's office on or before the twentieth day after service of this Writ of Subpœna excluding the day thereof, otherwise the Bill may be taken pro confesso.

O. C. FULLER, *Clerk,*
By J. C. PRINTUP,
Deputy Clerk.

Marshal's Return.

I certify that I served the within writ of subpœna on the parties at the places, time and in the manner stated below.

Name of person served.	How served.	When served.	Where served.
Floyd Co. to J. G. Pollock, Chairman Board Roads Rev....	P'ers,	May 27th, 1915,	Rome, Ga.
J. G. Pollock.....	"	" 27th, 1915,	Rome, Ga.
J. S. Davis.......	"	" 27th, 1915,	"
C. L. Conn.....	"	" 27th, 1915,	"
C. M. Young....	"	" 27th, 1915,	10 M. N. Rome, Ga.
P. C. Griffin.....	"	" 27th, 1915,	9 M. S. "
W. H. Norton...	"	" 27th, 1915,	16 M. N. E. Rome.

The return of Howard Thompson, Marshal, this 27th day of May, 1915.

By W. A. WARDLAW, *Deputy.*

Marshal's Cost $25.00.

U. S. District Court. Filed in Clerk's Office June 11, 1915. O. C. Fuller, Clerk, by J. C. Printup, Deputy.

16 *Defendant's Motion to Dismiss Bill.*

In the District Court of the United States of the Northern District of Georgia, Northwestern Division.

ROME RAILWAY & LIGHT COMPANY
vs.
FLOYD COUNTY et al.

Now comes the defendants in the above stated cause and move to dismiss the above stated cause of action and for grounds of said motion say:

First. That the District Court of the United States of the Northern District of Georgia, northwestern division, has no jurisdiction in said cause, there being no federal question involved.

Second. That the averments of said bill of complaint are insufficient to authorize the granting of relief prayed for.

Third. That the act of the General Assembly of Georgia approved August 15th, 1914, the validity of which is attacked in said bill of complaint is not unconstitutional, void or voidable for any reason set forth therein.

Fourth. That said act of the General Assembly of Georgia approved August 15th, 1914, repealed all previous acts referred to in said bill of complaint and in the amendment thereto, and is a valid enactment in all respects. Wherefore, the premises considered defendants pray that said bill of complaint as amended be dismissed.

M. B. EUBANKS,
J. BRANHAM,
MADDOX & DOYAL,
Defendant's Attorneys.

U. S. District Court. Filed in Clerk's Office July 13, 1915. O. C. Fuller, Clerk, by J. D. Steward, D. C.

17 *Amendment to Original Bill.*

In the District Court of the United States for the Northern District of Georgia, Northwestern Division.

No. 26. In Equity.

ROME RAILWAY & LIGHT COMPANY
vs.
FLOYD COUNTY, GEORGIA, and THE BOARD OF COMMISSIONERS OF Roads & Revenue of Floyd County, To wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin, and W. N. Horton.

Now comes the plaintiff in the above stated cause and on leave of Court first had and obtained, amends its petition, and for amendment says:

That the Acts of the Legislature of Georgia granting rights and franchises to the Rome Street Railroad Company, which plaintiff now claims to own, are the following, to wit:

An Act approved December 12th, 1884, as contained in the published volume of Georgia Laws for the years 1884 and 1885, pages 191 and 192.

An Act approved October 7th, 1885, contained in the same volume of Georgia Laws on pages 235 and 236.

An Act approved September 21st, 1887, and contained in the published volume of Georgia Laws for the year 1887 on pages 148, 149, and 150.

An Act approved November 12th, 1889 as contained in the published volume of Georgia Laws for the year 1889 on pages 696 and 697.

That plaintiff also claims the rights and franchises obtained through petitions filed with the Secretary of State of the State of Georgia, as follows, to wit:

By petition filed by J. King, J. L. Camp, John J. Seay, E. J. McGhee and S. S. King, with said Secretary of State, on September 17th, 1894, said petitioners being grantees under sale of the property, rights and franchises of the Rome Street Railroad
18 Company, by virtue of and by authority of a security mortgage deed made by said Rome Street Railroad Company to the American Security & Trust Co. Said petition being filed as provided by Code of 1910, of Georgia, Section 2585 (12), for the purpose of securing all the rights, powers and franchises of said Rome Street Railroad Company.

Also by petition filed by City Electric Railway Company with the Secretary of State of the State of Georgia, and order issued by said Secretary of State; the petition being filed and order bearing date July 31st, 1905.

Also by petition filed by S. A. Culbertson, L. W. Botts, Attilla Cox, Harry Weissinger, John L. Helm, Jas. P. Helm, S. S. Bush, J. B. Stewart, C. E. Claggett, J. W. Ewing and J. E. Dean, with the Secretary of State and order issued by said Secretary of State; the petition being filed and said order being dated November 30th, 1906. Said petition and order constituting the charter of the Rome Railway & Light Company.

The following is a statement in abstract of the conveyances under which the Rome Railway & Light Company claims title to the rights, powers and franchises of the Rome Street Railroad Company, and of the City Electric Railway Company, as claimed in said original petition now being amended.

On November 2nd, 1891, the Rome Street Railroad Company executed a mortgage deed of conveyance conveying to the American Security & Trust Co. of the District of Columbia, U. S. A., all of its property, rights and franchises, for the purpose of securing a bonded indebtedness therein fully set forth, which said mortgage deed was recorded in the Clerk's office of the Superior Court of Floyd County, Georgia, in Book V of Mortgages, pages 455 to 570 inclusive, in which said mortgage deed, there was provision for the sale by said trustee of said property, rights, and franchises, in case of default in payment of interest or principal of said bonds.

Afterwards, to wit, by virtue of said provision of sale, and because of such default, said property was sold by said trustee, in accordance with the powers of sail- contained in said mortgage deed, to
John M. Bonham, a deed of conveyance being duly executed
19 by said trustee to said Bonham and recorded in the Clerk's
office of the Superior Court of Floyd County, Georgia, in Book of Deeds, XX, page 578.

John M. Bonham by deed to J. King, J. L. Camp, John J. Seay, E. J. McGhee and S. S. King, dated the 4th day of September, 1884, recorded in the Clerk's office of the Superior Court of Floyd County in Book of Deeds XX, page 584.

J. King, J. L. Camp, John J. Seay, E. J. McGhee and S. S. King to the City Electric Railway Company of Rome, Georgia, executed October 1st, 1894, recorded in the Clerk's office of the Superior Court of Floyd County, Georgia, in Book of Deeds XX, page 645.

City Electric Railway Company to S. A. Culbertson, Attilla Cox, Harry Weissinger, John L. Helm, Jas. P. Helm, C. E. Claggett, L. W. Botts, S. S. Bush, J. E. Dean and J. B. Stewart, deed dated November 28th, 1906, recorded in the Clerk's office of the Superior Court of Floyd County, Georgia, in Book of Deed WWW, pages 593-9.

The last above named grantees to the Rome Railway & Light Company, by deed executed by said grantors at various dates within the months of January and February, 1907, to the Rome Railway & Light Company, filed for record February 13th, 1907, and recorded in the Clerk's office of the Superior Court of Floyd County, Georgia, in Book of Deeds WWW, pages 593-9.

All of the foregoing conveyances conveyed all the property, rights and franchises as owned by the Rome Street Railroad Company and the City Electric Railway Company.

For further amendment plaintiff says its rights to the use of all of said bridges for the construction, maintenance and operation of its railway system was granted by the Legislature of the State of Georgia by virtue of said several Acts herein referred to; that said rights were so given independent of and without the necessity of procuring the consent, approval or acquiescence of the County of Floyd, or of the Board of Commissioners of Roads and Revenue of said County, or of the City of Rome, or of the Mayor and Council of said City.

20 That the Rome Street Railroad Company laid its tracks
over the bridge across the Etowah River in Howard Street, now Second Avenue, in the year 1885, and operated cars thereover by horse power continuously until the year 1892. During which year the Rome Street Railroad Company adopted the use of electric power to propel its cars and equipped its system with electric appliances and extended its lines over and beyond all three of said

bridges, and cars propelled by electricity have been continuously run over all of said bridges by the Rome Street Railroad Company and its successors in title since the time that said system was first equipped for operation by electricity, which was at a time not later than April 1893.

For further amendment plaintiff says that while it was not necessary for the County of Floyd, or the Board of Commissioners of Roads and Revenue of said County to consent, approve or acquiesce in the use of said bridges by the Rome Street Railroad Company, or its successors in title, for the construction, maintenance and operation of a street car system, with cars propelled by electricity, over said bridges, nevertheless such consent, approval and acquiescence was given in the following manner to wit; on October 6th, 1884, at a meeting of the Board of Commissioners of Roads and Revenue of Floyd County, Georgia, the following order was passed and was entered upon the minutes of said Board in the following words, to wit; "upon motion the following order was passed. The Board of Commissioners of Roads and Revenue of Floyd County will not object to the City of Rome granting the right to the Street Railroad Company to cross the Howard Street Bridge, provided no obstruction to public travel arises therefrom, and also that the franchise be limited as to time."

On February 25th, 1892, at a meeting of the Board of Commissioners of Roads & Revenue of said County, said Board passed a resolution and caused the same to be entered upon its minutes approving a written instrument in the following language;—"Georgia, Floyd County. This agreement made by the County of Floyd of said State through its Board of Commissioners of Roads & Revenue of
the first part and the Rome Street Railroad Company of the
21 same County of the second part. Witnesseth; That said party
of the first part grants to the said party of the second part the right to lay and maintain a single track on one side of the County Bridges at Rome, to wit:—The bridge on the Oostanaula River on Fifth Avenue, the bridge on the Etowah River at the westerly end of Broad Street and the bridge over the Etowah River at the easterly end of Second Avenue, with the right to place electric wires and appliances and to run electric cars across said bridges upon the consideration and conditions herein named.

Said Company shall pay annually to said party of the first part One Hundred ($100.00) for each bridge that may be used, in consideration of the grant herein named, and shall begin to build its electric line in said City within ninety days from this day, and complete the same within a reasonable time thereafter.

The iron rails to be laid on the bridges shall be flat rails, or so laid that they will not rise higher than one inch and a quarter above the floor level of said bridges. The speed of the cars across said bridges shall not exceed three miles per hour and the line over said Fifth Avenue Bridge shall extend up Avenue A in the Fourth Ward.

Said party of the second part further agrees in the event of injury to either of said bridges caused by its cars or wire, then said injury shall be paid for by said party of the second part.

It further agrees to hold the County of Floyd harmless against any damages that may be recovered against it in the event of injury by said cars or wires to persons or vehicles crossing either of said bridges; wherever suit is brought against said company on account of any such injury, it shall be its duty to notify said party of the second part thereof and permit it to defend the same, said company further agrees to so arrange its wires and tracks as not to prevent the use of Fifth Avenue Bridge as a swing bridge.

Done by the authority of the Board of Commissioners of Roads and Revenue of Floyd County, Georgia, this the 25th day of February, 1892.

JOHN C. FOSTER,
WM. A. WRIGHT,
W. L. SELMAN,
ROME STREET RAILROAD COMPANY,
DEAN & DEAN, *Att'ys.*

On February 3rd, 1896 at a meeting of the Board of Commissioners of Roads and Revenue of said County, said Board
22 passed a resolution and caused the same to be entered upon its minutes approving a written instrument in the following language;—"Georgia, Floyd County. This agreement made by the County of Floyd of said State through its Board of Commissioners of Roads and Revenue (acting through its committee duly appointed, W. A. Wright and G. B. Holder) of the first part, and the City Electric Railway Co. of the same County, of the second part, Witnesseth:—that said party of the first part grants to said party of the second part the right to use its electric wires and appliances and to run electric cars across the Floyd County Bridges (using only a single track on one side of said bridges) as follows:—The bridge on the Etowah River at the southerly end of Broad Street, and the bridge over the Etowah River at the easterly end of Second Avenue, and the bridge over the Oostanaula River on Fifth Avenue.

Said Company shall pay annually to said party of the first part the sum of $200.00 for the use of said bridges in consideration of the grant herein named. The speed of cars across said bridges shall — exceed three miles per hour.

Said party of the second part further agrees in the event of injury of either of said bridges caused by its wires or cars, or appliances, then said injury shall be paid for by the said party of the second part. Said City Electric Company further agrees to hold Floyd County harmless against any damage that may be recovered against said Company in the event of injury by said cars, or wires, or appliances, to persons or property, while crossing either of said bridges.

Whenever suit is brought against Floyd County on account of any such injury, it shall be the duty of the Board of Commissioners to notify said party of the second part thereof and permit it to defend same. Said Company also agrees that its wires and tracks shall never be arranged so as to prevent the use of Fifth Avenue Bridge as a swinge bridge.

Signed this Jan. 24th. 1896.

CITY ELECTRIC RAILWAY COMPANY,
By J. B. MARVIN, *Gen'l. Mgr.*
BOARD OF COMMISSIONERS OF ROADS AND REVENUE, FLOYD COUNTY, GEORGIA,
By W. A. WRIGHT, *County Com."*
DEAN & DEAN AND
L. H. COVINGTON.
Attorneys for Plaintiff.

23

Order Allowing Amendment.

The foregoing amendment allowed and ordered filed. Let plaintiff, at its own cost, furnish one copy of same to the solicitors of record of defendant.

This the 10 day of July, 1915.

WM. T. NEWMAN,
U. S. Judge.

U. S. District Court. Filed in Clerk's Office 7th day of July, 1915. O. C. Fuller, Clerk, by J. D. Steward, Deputy.

24

Amendment to Original Bill.

In the District Court of the United States for the Northern District of Georgia, Northwestern Division.

No. 26. In Equity.

ROME RAILWAY & LIGHT COMPANY
vs.
FLOYD COUNTY, GEORGIA, and THE BOARD OF COMMISSIONERS OF Roads and Revenue of Floyd County, To wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin, and W. N. Horton.

Now comes the plaintiff in the above stated cause and on leave of Court first had and obtained, amends its bill, and for amendment says:

The Act of the Legislature of Georgia approved August 15, 1914, and mentioned in the original bill, when properly construed, does not authorize the defendants, or any of them, to charge against or to demand of this plaintiff one-third, or any other portion, of the cost of removing any of said bridges mentioned in the original bill, or of building any new ones in place thereof, but said Act, when properly construed, only provides for a charge of such character being made against persons or corporations not having a franchise to use said old bridges at the time of the passage of said Act. Nevertheless, said defendants are proposing and threatening and have assumed to require of this plaintiff one-third of the entire actual cost of removing each of said three old bridges and erecting new ones at the respecting sites thereof, which sums they require to be paid to the County Treasurer of Floyd County by this plaintiff before this plaintiff shall be allowed to exercise or use the franchise it has now and had at the time of the passage of said Act, or before this plaintiff shall be allowed to place any tracks, wires, equipment or operate any cars on and over said new bridges when finished.

Plaintiff alleges that such illegal acts and claims on the part of the defendants, if put into effect as defendants have resolved and determined to do, will operate to take the franchise and property of this plaintiff as set out in the original bill without due process
25 of law, and in denial of the equal protection of the laws, in violation of rights secured to this plaintiff by the Constitution of the United States and by the Constitution of the State of Georgia, as set out in said original bill, and furthermore this plaintiff alleges that said illegal claims, charges, demands and resolutions by the defendants and each of them, constitute a cloud upon this plaintiff's title to its franchise and property as set out in the original bill and substantially destroy the value of said franchise and property as therein set forth.

For further amendment plaintiff says that as to each of said bridges, and as a condition precedent to the exercise of the franchise which it has now and which it had at the time of the passage of said Act approved August 15, 1914, as stated in the original bill, to operate its cars on and over each of said bridges, the defendants now propose and threaten to impose upon this plaintiff terms and conditions which are wholly unreasonable, and which amount to a taking or destruction of its said franchise as to each of said bridges by requiring this plaintiff to pay one-third of the actual cost of removing each of said bridges and building new ones in place thereof, which requirement, under the revised estimates of cost under the contracts already let for the tearing down and repairing of said bridges, will amount to the sum of approximately $75,000 in the aggregate as set forth in the answer of defendants, the said aggregate charge against this plaintiff being distributed among said three bridges as follows:

As to the bridge over the Etowah River on Second Avenue, Minimum cost...........................	$20,500.00
As to the bridge over the Etowah River on Broad Street, Minimum cost	$20,500.00
As to the bridge over the Oostanaula River on Fifth Avenue, possibly a minimum cost of.............	$29,000.00

With estimated increase of cost for each bridge to reach the aggregate of $75,000.00.

Plaintiff alleges that it cannot, by the most careful and prudent operation of its lines as a whole derive therefrom receipts sufficient to pay the aggregate sum, or any such sum, as is sought to be

charged against it as set forth herein, or as set forth in the original bill, or any part of such sum, and have left from such re-
26 ceipts of operation a sum sufficient to pay the operating expenses of its line and a reasonable return to the plaintiff for its investment in its line as an entirety; and plaintiff further alleges that it cannot by the most careful and prudent operation of any division or extension of any of its lines across any of said bridges so operate such division or extension as to derive therefrom receipts sufficient to pay the amount, or any part thereof, sought to be charged against it for the particular bridge crossed by such extension or division as set forth herein, or in said original bill or any part of such sum, and have left from such receipts of operation a sum sufficient to pay the operating expenses of such division or extension of its line crossing such bridge, and a reasonable return to this plaintiff for its investment in said division or extension, and plaintiff further alleges that to deny it the right to cross any of said bridges when rebuilt excepting upon the illegal and unreasonable terms or conditions sought to be imposed by the defendants as set forth in the original bill as herein amended, will so destroy the value of plaintiff's property and franchises that it can neither borrow the money nor earn the money with which to pay said illegal charges or demands, or any part thereof, and the plaintiff is not possessed of a sum of money or property sufficient to pay said charges, or any part thereof, and would have no means to procure the same under the illegal and unreasonable terms and conditions sought to be imposed upon it, for which reason it would be deprived of its property and franchise and of the use thereof, and the value of its said property and franchises would be substantially destroyed without due process of law.

For further amendment plaintiff inserts the following words "in the manner proposed and threatened by them" after the word "effect" and before the word "any" in the second line of the last prayer of the original bill.

Wherefore plaintiff asks that the Court approve and allow this amendment.

TRABUE, DOOLAN & COX,
DEAN & DEAN,
Solicitors for Plaintiff.

27 STATE OF KENTUCKY,
County of Jefferson, ss:

Affiant, S. S. Bush, says that he is Vice-president and General Manager of the Rome Railway and Light Company, plaintiff in the foregoing bill, and as such has personal knowledge of the matters therein stated, and the averments of said amended bill and said original bill as thereby amended are true.

S. S. BUSH.

Subscribed and sworn to before me, an officer of the State of Kentucky, duly authorized to administer oaths, this 5th day of

August, 1915. My commission expires on the 23rd day of January, 1918.

MENEFEE WIRGMAN,
Notary Public, Jefferson Co., Ky.

Order Allowing Amendment.

The foregoing amendment allowed and ordered filed without prejudice. Let plaintiff, at its own cost, furnish one copy of the same to the solicitors of record of defendant.

This the 17th day of August, 1915.

WM. T. NEWMAN,
U. S. Judge.

U. S. District Court. Filed in Clerk's Office Aug. 21, 1915. O. C. Fuller, Clerk, by J. C. Printup, Deputy.

28 *Defendant's Motion to Dismiss Bill as Amended.*

No. 26. In Equity.

ROME RAILWAY & LIGHT COMPANY
vs.
FLOYD COUNTY and THE BOARD OF COMMISSIONERS OF ROADS AND Revenues of Floyd County, To wit: J. C. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin and W. N. Horton.

Now come defendants in the above stated case and move to dismiss the same as amended upon each and all of the grounds of their motion to dismiss same heretofore filed in this court.

M. B. EUBANKS,
J. BRANHAM,
MADDOX & DOYAL,
Defendant's Attorneys.

U. S. District Court. Filed in Clerk's Office Sept. 6, 1915. O. C. Fuller, Clerk, by J. C. Printup, Deputy.

29 *Amendment to Original Bill.*

In the District Court of the United States for the Northern District of Georgia, Northwestern Division.

No. 26. In Equity.

ROME RAILWAY & LIGHT COMPANY
vs.
FLOYD COUNTY, GEORGIA, and THE BOARD OF COMMISSIONERS OF Roads and Revenues of Floyd County, Georgia, To wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin and W. N. Horton.

Now comes the plaintiff in the above stated cause and on leave of Court first had and obtained, amends its Bill, and for amendment says:

The Mayor and Council of the City of Rome, by due and proper Ordinances passed on June 2nd. 1884, April 11th, 1885, July 20th, 1885 and August 17th, 1885, consented to the construction of a street passenger railway line of the Rome Street Railroad Co., within the corporate limits of said City of Rome, as authorized and provided by the Act incorporating said Rome Street Railroad Co., approved December 12th, 1884, over the bridges and streets in said city.

Plaintiff asks that the Court approve and allow this amendment.

JNO. C. DOOLAN.
DEAN & DEAN.

STATE OF GEORGIA,
County of Floyd:

Affiant, L. A. Dean says that he is Counsel for the Rome Railway & Light Co., plaintiff in the foregoing amended bill, and as such, has personal knowledge of the matters therein stated, and the averments of said amended bill are true.

L. A. DEAN.

Subscribed and sworn to before me, an officer of the State of Georgia, duly authorized to administer oaths, on this the 12th day of November, 1915.

P. B. HARBOUR,
Notary Public, Floyd County, Ga.

30 *Order Allowing Amendment.*

The foregoing amendment allowed and ordered filed. Let plaintiff at its own cost, furnish one copy of same to the Solicitors of Record for defendant.

This 13 day of November, 1915.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's Office Nov. 15th 1915. O. C. Fuller, Clerk, by J. C. Printup, Deputy.

31 *Opinion of the Court.*

In the District Court of the United States for the Northern District of Georgia, Northwestern Division.

No. 26. In Equity.

ROME RAILWAY AND LIGHT COMPANY.
VS.
FLOYD COUNTY, GEORGIA, and THE BOARD OF COMMISSIONERS OF Roads and Revenues of Floyd County, Georgia, To wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin and W. N. Horton.

The case now before the court is a bill brought by the Rome Railway & Light Co. against the County of Floyd and J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin and W. N. Horton, composing the Board of Commissioners of Roads and Revenues of Floyd County. The purpose of the bill is to enjoin the enforcement of an act of the Legislature of August 15th, 1914, with reference to the condemnation of certain old bridges and the erection of new bridges in their places, that is to say the Second Avenue bridge, spanning the Etowah River, the Broad Street bridge spanning the same and the Fifth Avenue bridge spanning the Oostanaula River at Rome, in said County of Floyd. The act in question has the following title:

"Floyd County, Control of Bridges in Rome.

No. 487.

"An Act to vest in Floyd County full and complete title, jurisdiction over and control of the following bridges within the city of Rome, in Floyd County, Georgia, to wit: Second Avenue Bridge, spanning the Etowah River; Broad Street Bridge, spanning the Etowah River; and Fifth Avenue Bridge spanning the Oostanaula River; to revoke any and all permits granted by legislature or municipal or county authority to any street railway company, electric light, telegraph, telephone or gas company to lay tracks and operate cars on and over said bridges or to place wires or pipes and operate the same on and over said bridges; to repeal all franchises heretofore granted to all such public service corporations to operate on and over said bridges, whether granted by legislative, county or municipal authority upon condition; to authorize the county authorities of Floyd County to condemn and remove the present bridges and to build new bridges at the same points, and to authorize
32 the county to acquire the necessary land for the purpose of
constructing bridges wide enough to meet the demands of public travel; to authorize said county to require of any street railway company or electric railway company desiring to lay the tracks on and operate its cars over said bridges, or either of them, to pay to said county a sum equal to one-third of the actual cost of building either of said bridges before any such company shall be allowed to lay any tracks, place any wires or other equipment or operate any cars on or over such bridge or bridges, and to fix the rights of such corporation by reason of such payments; to grant to the county authorities of Floyd County the exclusive right and jurisdiction to grant permission and franchises to persons, firms and corporations exercising public service functions, to operate on or over said bridges, and to prescribe the terms and limitations of such grants; to provide that any person, firm or corporation desiring to contest the validity of this Act shall do so by injunction proceedings before the beginning of the work of tearing down and removing the old bridges, and not otherwise; to provide for the acceptance of this Act by the county and city authorities, and for other purposes."

The first section of the Act places all right, title and interest in the bridges named, together with full jurisdiction over and control thereof, in the County of Floyd, such jurisdiction to be exercised by the authorities of Floyd County.

The second section provides that all permits and franchises heretofore granted, either by the General Assembly, the municipal authorities of the City of Rome, or the county authorities of Floyd County to any street railway company, electric light company, or other companies named, to lay tracks and operate cars on and over said bridges, or either of them, or to place any wires, pipes and equipment and operate the same over said bridges, are revoked and repealed so far as the same applies to any future bridges hereafter to be constructed under this or any other law, unless the said companies will conform to the reasonable terms and conditions required by the county authorities.

The third section gives to the County of Floyd authority to condemn and remove the present bridges and to build new bridges at the same sites, and it is allowed to acquire any land necessary for the purpose, etc., and all public service corporations, street railway companies, telegraph, telephone, light and gas companies are required, when notified to do so, to remove all tracks, wires, pipes and other equipment from said bridges and each of them, as required by the county authorities.

The fourth section is as follows:

33 "Be it further enacted, That the county authorities of said County are hereby given the exclusive right and jurisdiction to grant permission and franchises to persons, firms and corporations, exercising public service functions, to operate on and over said bridges, and to place railway tracks thereon and to operate cars on and over said bridges, and to prescribe the terms and limitations of such grants; and the county authorities of said county are authorized to require of any street railway company or electric railway company as a condition precedent to the laying of tracks, placing of wires and operating of cars on and over said bridges, that it pay to said county a sum equal to one-third of the actual cost of the building of said bridges, and the sum shall be paid to the treasurer of said county before any such company shall be allowed to lay any tracks, to place any wires or other equipment or operate any cars on and over such bridges, but any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the board of commissioners and the terms of this Act."

The fifth section is as follows:

"Be it further anacted, That any railway company, electric railway company or other public service corporation, paying the sum required under and by the preceding section shall acquire only the same rights to operate on and over said bridges as they may have on and over the streets leading to and from such bridges, and shall not be deemed to have acquired any right, title or interest in such bridges, or control over the same."

The sixth section provides that any person, firm or corporation desiring to contest the validity of any part of this Act shall do so by injunction proceedings before the beginning of the work of tearing down and removing the bridges, and for notice to all persons, firms or corporations of the time when work was to begin by publishing notice thereof by the chairman of the board of commissioners in the newspapers in which sheriff sales are advertised, this notice to state when the work was to commence, as near as practicable, and the estimate of the cost of each bridge, said notice to be published once a week for two weeks, the last publication to be at least thirty days before the work was to begin, etc.

No question is made in the bill but that the terms of this Act in Sections Six, Seven and Eight have been complied with. The real attack is upon the constitutionality of the act as against the rights of the plaintiff company.

A great many acts, ordinances and resolutions have been presented to the court as giving rights to the plaintiff to occupy these bridges without being required to pay a part of the cost of the same, as provided in this Act. There is some doubt about whether the 34 provisions of this act apply to corporations which already have franchises to go upon these bridges or any of them, if they comply with the reasonable requirements of the County Commissioners with reference to the occupancy of the same, but I shall assume for the purpose of disposing of the case that the County Commissioners will require them to pay one-third of the cost of the bridges before allowing their tracks to be laid and their cars to be run over the same.

This bill was evidently passed in the exercise of the police power of the State. It provides for the condemnation and tearing down of the old bridges in the interest of and for the safety of the public and for the same reason, for the erection of new bridges.

It is perfectly clear that the Legislature has the power to pass this act in the exercise of the police power. Where the life and safety of the public is endangered, it is perfectly clear that the Legislature may authorize the destruction of the bridges, if, indeed, the county authorities would not themselves have such power. Also it seems to me to be perfectly clear that even if the plaintiff Company, or any of its predecessors, had acquired rights as to the use of these bridges, such rights would be entirely destroyed when the bridges became useless and dangerous and large expense would necessarily be involved in the erection of new bridges. The power would, I think, then exist to fix such proportion of the cost of erecting new bridges to be born- by the street railway companies desiring to occupy the same, as the Legislature might deem reasonable, provided it was not so grossly unfair as to render the same entirely unreasonable and unjust.

All of this relates to the plaintiff upon the assumption that it has some rights in the bridges by what has occurred heretofore, either by action of the Legislature, or of the County Authorities or of the Municipal Authorities of Rome.

I have gone carefully through all of the acts of the Legislature and the ordinances and resolutions as stated, and I find nothing whatever in these which gives to this company any such vested in-

terests, or such right to occupy and use these bridges as
35 *as* would give it any right to object to this Act or to the terms of the Act. Everything which I have been able to find which it is claimed gives any vested right in these bridges, is so qualifies or there are such provisos, or in many instances such direct terms, as to make the right to occupy the bridges subject to revocation or to discontinuance by proper authorities. Certainly there is nothing in any of them which is sufficient to justify its claim of right to occupy the same in case the old bridges are destroyed and new ones built, except upon such terms as the legislature might prescribe.

I do not think that the decision of the Supreme Court of the State in County of Floyd v. Rome Street Railroad Co., 77 Ga. 614, is important here because we now have a distinct act of the Legislature, which I have recited above, providing for the destruction of the bridges and the building of new bridges, and fixing the terms upon which corporations, such as the plaintiff may occupy them.

In my opinion there is nothing whatever in the bill or in anything to which it refers which gives the plaintiff company any right to enjoin the enforcement of the Act of the Legislature of August 15th, 1914. I think the defendants are entitled to a decree dismissing the bill, and such a decree may be taken.

This 15th day of December, 1915.

WM. T. NEWMAN,
U. S. Judge.

U. S. District Court. Filed in Clerk's Office Jan. 5, 1916. O. C. Fuller, Clerk, by J. C. Printup, Deputy.

36 In the District Court of the United States for the Northern District of Georgia, Northwestern Division.

Number 26. In Equity.

Rome Railway & Loght Co.
v.
Floyd County, Georgia, and The Board of Commissioners of Roads and Revenues of Floyd County, Ga., To Wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. G. Griffin, and W. N. Horton.

Decree.

The above stated case having come on for a hearing before the Court on a motion of the defendants to dismiss the bill of complaint, as amended, after argument of counsel, the Court took said matter under consideration and, on December 15th, rendered an opinion sustaining said motion and directing that an order and decree of Court be taken dismissing said bill of complaint, as amended.

In accordance therewith, it is ordered, adjudged and decreed that said bill of complaint, as amended be and is hereby dismissed, and judgment is rendered against complainant for the costs of suit to be assessed by the Clerk of said Court.

Signed in open Court this the 15th day of February, 1915.

WM. T. NEWMAN,
U. S. Judge.

Filed in Clerk's Office Feb. 15, 1916. O. C. Fuller, Clerk, by J. C. Printup, Dep. Cl'k.

37 In the District Court of the United States for the Northern District of Georgia, Northwestern Division.

No. 26. In Equity.

ROME RAILWAY & LIGHT COMPANY, Complainant,

vs.

FLOYD COUNTY, GEORGIA, and THE BOARD OF COMMISSIONERS OF Roads and Revenues of Floyd County, Georgia. To Wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin, and W. N. Horton, Defendants.

Petition for Appeal.

The Complainant in the above styled cause, Rome Railway & Light Company, conceiving itself aggrieved by the decree made and entered herein on February 15, 1916, does hereby pray an appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was entered, duly authenticated, may be sent to the Supreme Court of the United States.

L. A. DEAN,
JOHN C. DOOLAN,
Solicitors for Complainant, Rome Railway & Light Company.

J. E. DEAN,
E. F. TRABUE,
ATTILLA COX, JR.,
Of Counsel.

U. S. District Court. Filed in Clerk's Office June 5, 1916. O. C. Fuller, Clerk.

The above petition for an appeal is hereby granted and allowed. Let bond be given in the sum of Five hundred dollars conditioned as by law provided in such cases.

WM. T. NEWMAN,
U. S. Judge.

This 5th day of June 1916.

U. S. District Court. Filed in Clerk's Office Jun- 5, 1916. O. C. Fuller, Clerk.

38 *Assignment of Errors.*

In the District Court of the United States for the Northern District of Georgia, Northwestern Division.

No. 26. In Equity.

Rome Railway & Light Company, Complainant,
v.
Floyd County, Georgia, and The Board of Commissioners of Roads and Revenues of Floyd County, Georgia, To wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin, and W. N. Horton, Defendants.

The complainant herein, in connection with its petition for an appeal, makes the following assignment of errors, which it avers occurred upon the trial of this cause and in the proceedings prior to the trial thereof, to-wit:

First. The Court erred in sustaining each of the motions of the defendants to dismiss the bill as herein amended which motions were entered respectively July 13, 1915, and September 6, 1915, and further erred in rendering the decree herein entered on February 15, 1916, dismissing complainant's bill as amended pursuant to such motions respectively.

Second. The Court erred in holding that the Act of the Legislature of Georgia, approved August 15, 1914, as referred to in the original bill (and in the opinion delivered by the Judge of this Court under date December 15, 1915, and filed in the Clerk's office of the Court on January 5, 1916) authorized the defendants, the Board of Commissioners of Roads and Revenues of Floyd County, or any of the defendants, to fix, in their discretion, any proportion of the cost of erecting new bridges at any of the points mentioned in the bill of complaint, to be borne by this complainant, and further erred in holding that said Act, or any section or portion thereof, conferred upon said defendants, or any of the defendants the power to impose upon the complainant any portion of the cost of
39 erecting said new bridges mentioned in the bill of complaint or any of them.

Third. The Court erred in holding that said Act conferred upon said defendants or any of the defendants, the right to exact of complainant the payment of any sum whatever, as a condition precedent to allowing the complainant to lay its tracks or place its wires or operate its cars on or over any of said bridges when completed, or the right to prevent the complainant from laying its tracks or placing its wires or operating its cars on or over said bridges or any of them, except on condition of paying to the said Board of Commissioners of Roads and Revenues of Floyd County, Georgia one-third or any part of the cost of erecting any of said bridges.

Fourth. The Court erred in holding that under said Act approved August 15, 1914, or any portion or section thereof, the defendants or any of them had any power to deny to the complainant upon any terms or conditions whatsoever the power to lay its tracks or place its wires or operate its cars over said bridges when completed or reconstructed or to impose any conditions whatever upon the exercise by complainant of its existing franchises and rights to lay its tracks and place its wires and operate its cars over said new bridges when completed or reconstructed.

Fifth. The Court erred in refusing to hold that the complainant has under the Acts of the Legislature of Georgia and the ordinances adopted by the City of Rome, Georgia, and the ordinances adopted by the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, and the contracts entered into between the complainant and the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, as set forth in the bill of complaint, as herein amended, a vested right to lay its tracks, place its wires and operate its cars on and over said new bridges when completed or any renewals or reconstruction of any of said bridges.

40 Sixth. The Court erred in holding that the conditions imposed or sought to be imposed by the Board of Commissioners of Roads and Revenues of Floyd County, Georgia upon the exercise by complainant of its franchise theretofore existing to lay its tracks or place its wires or operate its cars on or over any of said bridges were or are reasonable conditions or were or are such conditions as said Board of Commissioners of Roads and Revenues of Floyd County, Georgia, could lawfully or properly impose upon the exercise by complainant of its said franchise rights over any of said bridges.

Seventh. The Court erred in holding that it was competent to the Legislature of Georgia or that it had any power under the provisions of Article 1, Section 3, Paragraph 3, of the Constitution of the State of Georgia, to confer upon the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, or upon any of the defendants herein the right to impose upon this complainant any conditions whatever upon the exercise by its said franchises theretofore granted or to revoke any of the franchises or special privileges or immunities theretofore granted to complainant by the State of Georgia in the manner attempted in this case, i. e., in such manner as to work injustice to the corporators and creditors of the complainant or to impair the obligation of complainant's contract as contained in the franchise and charter granted by the State of Georgia to its predecessor in interest the Rome Street Railroad Company, which franchise and charter have been transferred to and are owned by your complainant.

Eighth. The Court erred in holding that it was competent to the Legislature of Georgia or to any of the defendants herein or to any branch of the legislative or executive or judicial power of the State of Georgia to deny or defeat or destroy or impair the existing franchise or contract rights of the complainant to lay its tracks, place its wires and operate its cars on or over any of said bridges or to annex any condition whatever to the exercise by the complainant of its said franchise and contract rights, and the Court erred in refusing 41 to hold that the orders made or ordinances adopted by the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, by which it sought to impose upon complainant as a condition of exercising its existing franchise and contract rights aforesaid the payment of one-third the cost of erecting any of said new bridges when reconstructed are each and all null and void as being contrary to and in violation of the provisions of the Constitution of the United States of America, and of the Fourteenth Amendment thereto, and especially those sections of said Constitution and said Amendment which forbid the State of Georgia through any instrumentality whatever, to impair the obligation of complainant's contract or to deprive the complainant of its property without due process of law or to deny to it the equal protection of the laws.

Ninth. The Court erred in holding that the franchise rights or contract rights heretofore belonging to and enjoyed and exercised by the complainant or by its predecessors in title were revoked or cancelled or annulled, or could be revoked or cancelled or annulled by said Act of the Legislature of Georgia, Approved August 15, 1914, as set forth in the Exhibit to the bill of complaint, by any other Act of the Legislature of Georgia referred to in the record of this cause.

Tenth. The Court erred in so construing the Act of the Legislature of Georgia, approved August 15, 1914 (referred to in the original bill) as to hold that it conferred upon the Board of Commissioners of Roads and Revenue of Floyd County, Georgia, any power whatever to pass any of the orders referred to in the original bill or to impose by any of such orders any part of the cost of removing the old bridges or erecting new ones as herein set forth, or to deny to the complainant the right to place its tracks, wires and equipment and operate its cars on or over said new bridges or any of them when finished upon any conditions whatever or to im-
42 pose any conditions whatever upon the exercise by the complainant of its rights theretofore existing as set forth in the original bill as amended.

Eleventh. The Court erred in refusing to enjoin the defendants from the enforcement of the orders passed by them on the ground that said orders were and are null and void and erred in refusing to hold that said orders are null and void because in violation of the Act of the Legislature of Georgia approved August 15, 1914 and also in violation of certain provisions of the Constitution and laws of the State of Georgia and of the Constitution of the United States and Amendment thereto, all of which are hereinbefore pointed out.

Wherefore, the complainant makes the foregoing assignment of errors to the end that same may be made a part of the record herein for appeal and that the decree herein rendered by this Court on February 15, 1916, shall be reversed with directions to grant the injunction as prayed in complainant's bill as amended.

L. A. DEAN,
JOHN C. DOOLAN,
Solicitors for the Complainant, Rome Railway & Light Company.

J. E. DEAN,
E. F. TRABUE,
ATTILLA COX, Jr., *Of Counsel.*

U. S. District Court Filed in Clerk's Office Jun- 5, 1916. O. C. Fuller, Clerk.

43

Appeal Bond.

Know all Men by these Presents, that we, Rome Railway & Light Company, as principal, and Edmund F. Trabue and John C. Doolan, as sureties, are held and firmly bound unto Floyd County, Georgia, and the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, to-wit:

J. G. Pollock, J. S. Davis, C. L. Conn, C. N. Young, P. C. Griffin, and W. N. Horton, in the full and just sum of Five Hundred and no/100 ($500.00)—dollars, to be paid to the said Floyd County, Georgia, and the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, to-wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. N. Young, P. C. Griffin and W. N. Horton, or their certain attorneys, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of June, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a regular term of the District Court of the United States for the Northern District of Georgia, in a suit depending in said Court, between said Rome Railway & Light Company as complainant and said Floyd County, Georgia, and the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, to-wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. N. Young, P. C. Griffin, and W. N. Horton, as defendants a decree was rendered against the said complainant, and in favor of said defendants, dismissing said suit and the said Rome Railway & Light Company having obtained an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Floyd County, Georgia, and the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, to-wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. N. Young, P. C. Griffin, and W. N. Horton citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Rome Railway and Light Company shall prosecute to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ROME RAILWAY & LIGHT COMPANY,
By S. S. BUSH, *Vice Pres. & G. Mgr.* [SEAL.]

Sealed and delivered in the presence of

Attest,

GEO. W. LEWIS, *Sec'y.* [SEAL.].
EDMUND F. TRABUE. [SEAL.]
JOHN C. DOOLAN. [SEAL.]

Witnesses as to Rome Railway & Light Company:
JOHN C. DOOLAN.
AILEEN B. MILLIKEN.

Witnesses as to sureties:
JOSEPH L. LOUGHMILLER.
EDITH JENNINGS.

Approved by—
WM. T. NEWMAN,
U. S. District Judge.

44 United States District Court, Northern District of Georgia.

ROME RAILWAY & LIGHT COMPANY, Complainant,
v.
FLOYD COUNTY et al., Defendants.

Affidavit.

The affiants, Edmund F. Trabue and John C. Doolan, state that they are residents of Jefferson County, Kentucky; that each of them is worth more than One Thousand ($1,000.00) Dollars in excess of all debts and liabilities; that each of them has real estate in Jefferson County, Kentucky free from encumbrance of the fair cash value of more than One Thousand ($1,000.00) Dollars over and above all debts and liabilities, and that they have executed an appeal bond in the above case as sureties for the Rome Railway & Light Company.

EDMUND F. TRABUE.
JOHN C. DOOLAN.

Subscribed and sworn to before me by Edmund F. Trabue and John C. Doolan, this 9th day of June, 1916.

JOSEPH L. LOUGHMILLER,
Notary Public, Jefferson County, Ky.

My Commission expires Feb. 7, 1920.

45 UNITED STATES OF AMERICA, *ss:*

To Floyd County, Georgia, and the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, To wit, J. G. Pollock, J. S. Davis, C. L. Conn, C. M. Young, P. C. Griffin, and W. N. Horton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a- appeal, filed in the Clerk's Office of the District Court of the United States for the Northern District of Georgia wherein The Rome Railway & Light Company is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this fifth day of June, in the year of our Lord one thousand nine hundred and Sixteen.

WM. T. NEWMAN,
Judge of the District Court of the United States
for the Northern District of Georgia.

U. S. District Court. Filed in Clerk's Office Jun- 5, 1916. O. C. Fuller, Clerk.

46 On this — day of June, in the year of our Lord one thousand nine hundred and sixteen, personally apeared before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

Sworn to and subscribed the — day of June, A. D. 1916.

Service of the within citation and receipt of copy thereof are hereby acknowledged, this 6th day of June, 1916.

J. BRANHAM,
M. B. EUBANKS,
G. E. MADDOX & DOYAL.
Solicitors for Appellees.

47 *Præcipe for Record.*

In the District Court of the United States for the Northern District of Georgia, Northwestern District.

No. 26. In Equity.

ROME RAILWAY & LIGHT COMPANY, Complainant,
v.
FLOYD COUNTY, GEORGIA, and THE BOARD OF COMMISSIONERS OF Roads and Revenues of Floyd County, Georgia, To wit: J. G. Pollock, J. S. Davis, C. L. Conn, C. N. Young, P. C. Griffin, and W. N. Horton, Defendants.

The complainant, in the above styled cause, hereby directs and requests the Clerk of this Court to make immediately a transcript of the record herein for appeal to the Supreme Court of the United States and he is directed to include in such transcript for appeal the following papers:

(1) The original bill in equity with all exhibits attached to same, filed in the Clerk's office May 26, 1915.

(2) The subpœna and return thereon.

(3) The motion by defendants to dismiss the bill, filed in the Clerk's office July 13, 1915.

(4) The amendment to the original bill and exhibits therewith,

filed in the Clerk's office July 7, 1915, and allowed and filed by the Court July 10, 1915.

(5) The amendment to the original bill allowed by the Court on August 17, 1915 and filed in the Clerk's office on August 21, 1915.

(6) The motion of defendants to dismiss complainant's bill as amended filed in the Clerk's office September 6, 1915.

(7) The amendment to the original bill allowed by the Court on November 13, 1915 and filed in the Clerk's office on November 15, 1915.

(8) The opinion of the Court dated December 15, 1915 and filed in the Clerk's office January 5, 1916.

48 (9) The decree herein entered February 15, 1915 sustaining the motions of defendants to dismiss the bill of complaint as amended and dismissing same.

(10) The assignment of errors filed June 5th, 1916.

(11) The petition for appeal filed June 5th, 1916.

(12) All orders of the Court made and entered with reference to the various motions and pleadings above specified together with this præcipe.

L. A. DEAN,
JOHN C. DOOLAN,
Solicitors for Complainant.

J. E. DEAN,
E. F. TRABUE,
ATTILLA COX, Jr.,
Of Counsel.

Service of the foregoing præcipe and receipt of a copy thereof are hereby acknowledged, this 6th day of June, 1916.

J. BRANHAM,
G. E. MADDOX,
M. B. EUBANKS,
Solicitors for Defendants.

U. S. District Court. Filed in Clerk's Office June 7, 1916. O. C. Fuller, Clerk.

49 United States of America,
Northern District of Georgia:

I, Olin C. Fuller, Clerk of the District Court of the United States for the Northern District of Georgia, do hereby certify that the foregoing and attached 48 pages of printing and writing contains a true, full, correct and complete copy of the original record, assignment of errors and all proceedings had in the case of Rome Railway & Light Company vs. Floyd County, Georgia, and others, as fully as the same remains on file and of record in my office at Rome, Georgia, and as stipulated by counsel, except that the original Citation with Acknowledgment of Service thereon, is included therein in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court at the city of Atlanta, Georgia, this the 26th day of June, A. D. 1916.

[Seal U. S. District Court, N. D. Georgia.]

OLIN C. FULLER,
Clerk U. S. District Court.

Endorsed on cover: File No. 25,377. N. Georgia D. C. U. S. Term No. 547. Rome Railway & Light Company, appellant, vs. Floyd County, Georgia, et al. Filed July 5th, 1916. File No. 25,377.

FILED
OCT 14 1916
JAMES D. MAHER
CLER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 547.

ROME RAILWAY & LIGHT COMPANY, Appellant,

versus

FLOYD COUNTY, GEORGIA, ET AL., - Appellees.

BRIEF FOR APPELLANT.

LINTON A. DEAN,
JOHN C. DOOLAN,
Solicitors for Appellant.

J. ED. DEAN,
EDMUND F. TRABUE,
ATTILLA COX, JR.,
Of Counsel.

Westerfield-Bonte Co., incorporated, Louisville, Ky.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 547.

Rome Railway & Light Company, - - *Appellant,*

versus

Floyd County, Georgia, et al., - - - *Appellees.*

BRIEF FOR APPELLANT.

May it please the Court:

This is an appeal from a decree of the District Court of the United States for the Northern District of Georgia, dismissing a bill filed by appellant, Rome Railway & Light Company, against appellees, Floyd County, Georgia, and the Board of Commissioners of Roads & Revenues, in whom the Georgia law vests governmental authority over roads and bridges in Floyd County.

We have printed, in an Appendix to this brief, such Georgia laws as are material for consideration on this appeal.

We shall hereafter refer to appellant as the "Railway Company," and to appellees as the "County Authorities."

Where pages of the record are mentioned, the reference is to the printed record.

All italics are ours, unless otherwise stated.

PRELIMINARY STATEMENT.

The Railway Company in its bill seeks an injunction against the County Authorities to protect its franchise rights to construct and maintain tracks and to operate an electric railway over certain bridges constituting parts of the public streets in the city of Rome, Floyd County, Georgia. This franchise was acquired by assignment from the Rome Street Railroad Company, to whom it was granted by Legislative Act.

The County Authorities contend that the franchise has been revoked and, therefore, they deny to the Railway Company the right to go on the bridges unless it will pay approximately $75,000.00, being one-third the estimated cost of the bridges. In other words, the County Authorities demand that the Railway Company *surrender its existing franchise* and *buy a new one* for $75,000.00.

The District Court dismissed the bill as amended, upon motions to dismiss for want of equity, thus sustaining the contention of the County Authorities. Hence this appeal.

JURISDICTION SHOWN.

The bill asserts rights in the Railway Company, a Georgia Corporation, guaranteed to it by the Contract Clause and by the Equal Protection Clause and by the Due Process Clause of the Federal Constitution, as well as by the Constitution of the State of Georgia. All these rights are denied by the decree appealed from. In such cases this court has jurisdiction upon direct appeal from the District Court, and it will consider the whole case, and enter its own decree, adjudging the rights secured to the Railway Company under the Constitution and laws of Georgia as well as the rights secured to it under the Constitution of the United States.

Siler, et al., v. *L. & N. R. R. Co.,* 213 U. S. 175.

STATEMENT OF CASE.

The Railway Company is a Georgia corporation, owning and operating an electric railway line in the city of Rome and in Floyd County, pursuant to authority given in its charter.

The County Authorities are invested by the laws of Georgia (Appendix II, p. 2; Appendix VII, pp. 13-19) with governmental authority over roads and bridges in Rome and Floyd County.

The Etowah and Oostanaula rivers run through the corporate limits of Rome, intersecting at three different points *within the city* the streets over which the lines of the Railway Company are constructed.

At such points of intersection, the streets are carried over the rivers on bridges, which, under the Georgia law, were constructed by the County Authorities, though located within the corporate limits of Rome.

These bridges constitute a part of the street or highway. It was so held, as to one of them (see original bill, Rec., p. 2), by the Supreme Court of Georgia in *Floyd County* v. *Rome Street Railroad Co.,* 77 Ga. 614, where it was also held that the franchises granted to the

Rome Street Railroad Company (and now owned by appellant) authorized that company to construct, maintain and operate its electric railway line over such bridges as a part of the street or highway and *over any renewal or reconstruction* of such bridges. (Post, pp. 17, 20.)

The original charter of the Rome Street Railroad Company (Appendix III, pp. 3-4) gave it power to operate a street railway by electricity or other motive power in the city of Rome, and in Floyd County outside the city of Rome. Section II of that charter granted an *express and unlimited* franchise to construct, maintain and operate an electric street railway in the city of Rome and in Floyd County over certain streets (which include the streets on which the tracks of the Railway Company are now located) and generally over "any other street in said city and through any and all future extensions of said streets or any of them."

By an amendment to this charter, approved October 7, 1885 (Appendix IV, pp. 5-6) the franchise originally granted was extended by the *Legislature* to cover all streets and highways of four towns adjacent to the city of Rome (since absorbed by it), and also for the distance of five miles from the corporate limits of Rome "along any public road leading into said city of Rome."

By further legislative amendment, approved September 21, 1887 (Appendix V, pp. 8-11) various additional powers were conferred (*not material* for present consideration), such as the power to condemn land, the power to maintain a park, and the power to operate cars by steam or dummy engines. This right *to use such engines* *was limited* to certain streets and the *use thereof* over such streets or the bridges forming a part of the streets was strictly regulated.

By further legislative amendment (Appendix VI, p. 12) the power granted by the amendment approved September 21, 1887, *supra*, to use steam or dummy engines in crossing county bridges, was still further limited, and moreover, the *County Authorities* were *thenceforth* prohibited from *thereafter* granting any vested or contract rights to pass on or over such bridges.

It will be observed this case does not involve any question of the use of steam or dummy engines, nor does it involve any question of a franchise, or vested or contract right, *granted by the County Authorities*, either before or after the amendment of November 12, 1889. The franchise claimed in this case was granted by the *Legislature* of Georgia in 1884. We have *no concern* in this case with any *subsequent* legislative amendments or with *any grants* from the County Authorities and all such amendments or grants subsequent to the original charter are immaterial to the decision of this case. We have simply printed them in the Appendix, in order that this court might have before it the entire charter of the Rome Street Railroad Company and all amendments thereto.

It also appears from the amended bill (Record, p. 17) that the County Authorities at the time of the original legislative grant, gave their consent to such franchise grant, although there was nothing in the Act of 1884 requiring such consent to be obtained, as a condition of the franchise granted by the Legislature. Likewise, the city of Rome consented at the same time. (See Amended Bill, Record, pp. 22-23.)

As shown by the amended bill (Record, p. 15), the franchises and property of the Rome Street Railroad Company were sold to the City Electric Railway Company under foreclosure proceedings by a trustee and in 1906 the Railway Company (appellant) acquired all such franchises and properties from the City Electric Railway Company.

The Railway Company having acquired the property and franchises granted as above set forth, placed a mortgage thereon for $750,000.00, selling its bonds upon the open market to innocent purchasers and using the proceeds in the construction, development and maintenance of its railway system (Record, p. 3).

In this situation, the Legislature of Georgia passed an Act, approved August 15, 1914 (Appendix VII, pp. 13-19), under which, the County Authorities claim that not only are they authorized to remove and reconstruct the bridges in question, but that the franchise of the Railway Company to use the bridges, when reconstructed, has been annulled.

Acting upon this theory, and claiming color of authority under the Act approved August 15, 1914, the County Authorities have, as shown by the bill, ordered the destruction of the three bridges above mentioned (thus severing the Railway Company's line into four parts) and have ordered the reconstruction of such bridges at an aggregate expense estimated originally at $260,000.00 (Exhibit B with Bill, Record, pp. 10-11) and have entered an order upon their records denying to the Railway Company the right to lay its tracks or place its wires or operate its cars on or over the new bridges when reconstructed unless the Railway Company will accept the annullment of its existing franchise and further agree to buy a new franchise over such bridges by paying one-third the cost of the construction thereof. This involves a charge against the Railway Company of more than $75,000.00, as a part of the cost of the construction of the three new bridges. In other words, its contract rights are sought to be impaired.

We shall later analyze this Act and more thoroughly consider its meaning.

For the present, it is sufficient to state, that the Railway Company contends, that it is the owner of an *unlimited franchise* to operate an electric railway over the bridges in question; that this franchise has been expressly recognized and upheld by the Supreme Court of Georgia in litigation with the County Authorities and is therefore *res judicata;* that under the *Contract Clause* of the Federal Constitution the State of Georgia has no power, through its Legislature or through any other agency, to destroy or impair the franchise originally granted to the Rome Street Railroad Company, and that moreover, the Constitution of Georgia forbids such action by the Legislature or any other agency of the State in a case like this, where it is shown that the rights of corporators and creditors are involved and that great injustice will be done to them by the annullment of the Railway Company's franchise, and the severance of its railway lines into four distinct parts, through denying it access to the bridges in question.

The Railway Company further contends that the enforcement against it of the orders made by the County Authorities would deny it the *equal protection* of the laws by arbitrarily imposing upon it an unwarranted proportion of the public burdens in the reconstruction of such bridges and would also deny to it *due process of law* in taking from it the franchise it already has without making any compensation therefor. To secure its rights, it relies upon the *Contract Clause,* the *Equal Protection Clause,* and in the *Due Process Clause,* of the Federal Constitution, and likewise upon the Constitution of Georgia, and a proper construction of its laws.

ASSIGNMENT OF ERRORS.

A detailed assignment of errors is made (Rec., pp. 29-31). Boiled down, they are as follows:

(1) The court erred in sustaining the motion of the County Authorities to dismiss the bill of the Railway Company as amended for want of equity.

Of course, this assignment brings up the entire bill and amendments thereto for consideration of all the equities therein presented.

(2) The court erred in adopting and approving an erroneous construction fixed by the County Authorities upon the Georgia Act approved August 15, 1914, upon which Act thus construed, the County Authorities have based their action, of which complaint is herein made.

This assignment involves merely a *construction* of the Georgia law. As it has been construed and applied by the County Authorities and by the court below, it invades rights of the Railway Company which are secured by the Federal Constitution.

As said by this court in *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478-484, a Federal question is presented in such a case.

(3) The court erred in sustaining the right of the County Authorities to demand of the Railway Company the payment of any sum whatever as a condition of using the new bridges when completed.

This is simply one phase of the main question.

(4) The court erred in holding that the County Authorities, under the Act approved August 15, 1914, had any power to deny the Railway Company access to the bridges in question.

This is another phase of the main question.

(5) The court erred in refusing to hold that the Railway Company had acquired a vested right to use the bridges in question or any renewals thereof.

This lies at the foundation of the whole case.

(6) The court erred in holding that the County Authorities could lawfully or properly impose any conditions upon the exercise by the Railway Company of its existing franchise rights over the bridges in question.

(7) The court erred in holding that the Legislature of Georgia, under the provisions of the Georgia Constitution, had any power to revoke or affect the franchises of the Railway Company previously granted, where such

action would injuriously affect the corporators and creditors of the Railway Company in the manner shown by this record.

(8) The court erred in holding that the State of Georgia, through its Legislature or any other agency or department of its government, had power to impair the franchise or contract right of the Railway Company to use the bridges in question in violation of the Contract Clause and of the Due Process Clause and of the Equal Protection Clause of the Federal Constitution.

(9) The court erred in holding that the franchise or contract rights of the Railway Company are revoked or could be revoked by the Georgia Act of August 15, 1914.

(10) The court erred in holding that the County Authorities under the Georgia Act of August 15, 1914, had authority to pass the orders or impose upon the Railway Company the conditions referred to in the bill.

(11) The court erred in refusing to hold that the orders of the County Authorities are null and void because in violation of the Federal Constitution and of the Georgia Constitution and of the Georgia Act of August 15, 1914.

The last four assignments of error present, in detail, particular phases of the same general questions covered by the preceding assignments.

PROPOSITIONS STATED.

An orderly presentation of this case on behalf of the Railway Company would seem to involve the following propositions:

I.

The Railway Company is the owner of all franchises and properties acquired and owned by the Rome Street Railroad Company.

II.

The Rome Street Railroad Company (predecessor in interest and title of the Railway Company) acquired, under the Legislative grants referred to, a franchise to lay its tracks, place its wires, and operate its cars with electricity on and over the bridges in question. It immediately accepted and acted upon such franchise and large sums have been invested by it and its successors in title on the faith thereof. There has been no waiver or abandonment of the franchise thus acquired.

III.

The franchise, thus acquired by the Railway Company, is not subject to revocation or amendment without consent of the owner and is unlimited in its duration. It constitutes a vested right or contract, protected by the Contract Clause of the Federal Constitution from impairment by any power of the State.

IV.

The Railway Company is also protected in its franchise to use these bridges by the Due Process Clause of the Federal Constitution.

V.

The Railway Company is further secured by the Equal Protection Clause of the Federal Constitution against the arbitrary and oppressive exactions and demands of the County Authorities in this case.

VI.

The Railway Company is further protected by the Constitution of Georgia in the enjoyment of the franchise rights acquired by it, upon the faith of which its corporators and its creditors have invested their money.

VII.

The Act of August 15, 1914, upon which the County Authorities rely, when properly construed, does not authorize the imposition upon the Railway Company of the oppressive and arbitrary burdens laid upon it by the County Authorities.

VIII.

The County Authorities, acting under color of legislative sanction, have so construed and applied the Georgia Act of August 15, 1914, as to impair the vested rights of the Railway Company in violation of the Federal Constitution and of the Constitution and laws of Georgia.

ARGUMENT.

We shall discuss the foregoing propositions in the order stated. To some extent the authorities cited and the arguments made on one point will necessarily bear upon the others.

I.

The Railway Company is the owner of all franchises and properties acquired and owned by the Rome Street Railroad Company.

As shown by the amended bill (Rec., pp. 15 and 16), the franchises and property of the Rome Street Railroad Company were sold to the City Electric Railway Company which in turn sold same to the Rome Railway & Light Company, appellant in this case.

That such franchises are transferable is no longer an open question in this court.

Owensboro v. *Cumberland, etc., Co.,* 230 U. S. 65.

The Georgia laws and the Georgia decisions, in the cases to be cited, affecting this identical franchise, recognize that such a franchise is assignable.

II.

The Rome Street Railroad Company (predecessor in interest and title of the Railway Company) acquired, under the legislative grants referred to, a franchise to lay its tracks, place its wires, and operate its cars with electricity on and over the bridges in question. It immediately accepted and acted upon such franchise and large sums have been invested by it and its successors in title on the faith thereof. There has been no waiver or abandonment of the franchise thus acquired.

Observe that the franchise claimed in this case was granted by direct action of the General Assembly of Georgia.

POWER OF LEGISLATURE TO GRANT FRANCHISE.

The only limitation upon its power to grant a franchise to a street railway corporation for the use of *any* public streets or highways *within the State* is to be found in Article III, Sec. 7, paragraph 20, of the Constitution (Georgia Code, Edition of 1911, Sec. 6448), which provides as follows:

> "The General Assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

The particular streets and bridges involved in this case were and are within the corporate limits of the city of Rome. The corporate authorities of Rome gave their consent to the grant of this franchise and the construction of the street railway pursuant thereto as shown by the admitted averments of the amended bill (Rec., pp. 22 and 23). It was unnecessary to obtain the consent of the County Authorities but such consent was in fact obtained as shown by the admitted averments of the amended bill (Rec., p. 17).

See also caption of the original charter incorporating the Rome Street Railroad Company and granting the franchise in question, Appendix III, p. 3, and the first amendment and extension of such charter, Appendix IV, p. 6.

Therefore no question can be made as to the power of the Legislature to grant the franchise in question. Undoubtedly it would have such power unless limited in some way by the Constitution of the State. This is settled by repeated decisions, hereafter cited.

The same principle is recognized and established in Georgia by the decision of its Supreme Court in *Brown* v. *Atlanta Electric R'y & Power Co.,* 113 Ga. 462.

This case holds that the General Assembly of Georgia had authority to grant *corporate powers* to a street car company, though the consent of the corporate authorities of the town or city, in which the lines were to be located, had not been obtained, but that the actual *construction* of such street railway upon the streets of a town or city can not be commenced, until the consent of such town or city thereto has been obtained, as provided by the section of the Georgia Constitution above quoted.

There was no general law in Georgia for the incorporation of Street Railway Companies until 1894 (Ga. Code of 1911, Sec. 2600).

We come, then, to consider the terms in which the franchise was granted.

Terms of Original Grant.

Observe that the grant is unlimited as to duration and without provision for repeal or alteration. We quote as follows from Section II (Appendix III, p. 4):

> "That said company shall have power and authority to survey, lay out, construct, and equip, use and employ street railroads in the city of Rome, and Floyd County, to-wit (then follows a specification of certain streets, including the streets on which the bridges in question are located and of which they form a part) * * * and any other street in said city, and through any and all future extensions of said streets, or any of them, and said company may use as motive power for their cars horses or electricity, * * * or any other appliance that may be hereafter invented or used as motive power * * *."

Section III of the same Act provides that the Rome Street Railroad Company may convey on their lines passengers or freight and charge reasonable and just rates for such transportation.

The first amendment of the charter by legislative act (Appendix IV, p. 6) approved October 7, 1885, provides in Section I thereof that in addition to powers theretofore granted the Rome Street Railroad Company

> "shall be and it is hereby authorized and empowered to extend its lines of street railroad through and along all of the streets, lanes and alleys of four

> towns therein named (since absorbed by the city of Rome) and shall also have the power and authority to extend its lines as much as five miles beyond the corporate limits of the city of Rome, along *any public road* leading into said city of Rome."

We mention this amendment to the charter, simply for the purpose of showing, that the owner of this franchise had the legal right to construct all extensions of its lines, which have in fact been constructed and extended, beyond the bridges in question, for distances of approximately one mile beyond the Second Avenue bridge, five miles beyond the Broad Street bridge, and two miles beyond the Fifth Avenue bridge (Original Bill, Rec., 3), and also for the purpose of showing, that the threatened action of the County Authorities, if allowed to take effect, will virtually destroy the property of the Railway Company by cutting it into four parts.

The amendment of October 7, 1885, is not otherwise material for consideration in this case because the franchise to cross these bridges was given by the original charter. This was distinctly held by the Supreme Court of Georgia in *Floyd County* v. *Rome Street Railroad Co.*, 77 Ga. 618-620, where the court, speaking with reference to one of these very bridges, says that the boundaries of the city of Rome included the Etowah and Oostanaula rivers; so that the bridges lie wholly within the corporate limits of Rome, and further (p. 618):

> "The bridge forms a continuation of the streets of the city across the river and is a part of the same."

And again (p. 620):

> "The right of the corporation to the use of this bridge accrued, as it seems from the record, and was complete, before the passage of the Act of October 7, 1885."

With reference to the amendment of October 7, 1885, the court said in the concluding sentence of its opinion,

> "this amendment was not intended to restrict or limit their franchise, but to extend it by its compliance with the conditions named in the Act."

Legislative Grant Binds County Authorities.

The language of these legislative acts is so clear and plain as to require no construction. This court has been called upon to consider many cases where a question was raised as to the power of a municipality to bind the State by a municipal grant of a franchise, but it has never, so far as we can discover, questioned the *power of the State,* through the authorized action of its General Assembly, *to bind the municipality* or the local authorities by a contract made or franchise granted.

This distinction between *municipal* grants and *legislative* grants has been clearly pointed out in the recent case of *Milwaukee, etc., R'y Co.* v. *Wisconsin,* 238 U. S. 174. There, an electric railway line had a franchise granted to it by the city of Milwaukee, which the court held created a binding contract between the City and the Railway Company but did not create a contract between the State of Wisconsin and the Railway Company of such binding force as to tie the hands of the State of Wisconsin from thereafter exercising its sovereign power in the matter. It appeared in that case that the State of Wisconsin had not authorized the City of Milwaukee to grant a franchise which the State of Wisconsin could not alter. Therefore the court held that the *Milwaukee case* was to be distinguished from cases, in which the sovereign power of the State had authorized the municipality to make a contract binding the State.

In this case, the General Assembly of Georgia has made the contract, out of which this franchise originates. It is the State's own direct contract and it falls directly within the protection of the Contract Clause of the Federal Constitution.

It appears from the bill, that the contract or franchise thus created by action of the General Assembly was promptly accepted and acted upon by the grantee and its successors in interest, and many hundreds of thousands of dollars have been invested on the faith of such contract.

The franchise to construct, maintain and operate a line of electric railway over and along the streets in question, obviously gives the right to construct, maintain and operate same along and over the entire length of such streets and not merely over detached portions of such streets. It embraces the entire length, whether the street be straight or crooked; elevated or depressed; and whether it extends across a railroad or a river. In any such case, if there is a bridge *forming a part* of the street, the franchise to use the street necessarily involves the franchise to use the bridge, which is part of the street. It matters not, by whom the bridge was constructed, whether by the city authorities of Rome or by the County Authorities, the paramount will of the General Assembly has decreed that the owner of the franchise shall have the right to construct, maintain and operate its railway line throughout the length of the street and over and across any bridges constituting a part of the street.

Res Judicata.

Fortunately for the Railway Company, this *identical* question was decided in 1887 by the Supreme Court of Georgia in a case where this *identical* franchise was involved and these County Authorities were parties.

We refer to the case of *Floyd County* v. *Rome Street Railroad Company,* 77 Ga. 614. That case was, in reasoning and effect, the same as this case. The Rome Street Railroad Company had, pursuant to its legislative franchise, constructed its railway over and across a bridge then known as the Howard Street bridge, now known as the Second Avenue bridge (Original Bill, Rec., p. 2). It was engaged in operating its line over the bridge, when the bridge was washed away by a flood, and it became necessary to build a new bridge.

Under the laws of Georgia, the obligation to build these bridges devolved upon the County Authorities, although the bridge was in fact located within the corporate limits of the city of Rome. The County Authorities proceeded to build the bridge and after it had been completed, the Rome Street Railroad Company started to lay its tracks thereon, so that it might operate its cars on and over the bridge, connecting with that portion of its line which lay beyond the bridge, upon the extension of the same street. The County Authorities refused it access to the bridge for that purpose. In the litigation which arose, the trial court decided against the County Authorities, who took the case to the Supreme Court of Georgia, where the judgment was affirmed.

After reciting the facts in some detail, the court said (p. 617):

> "The only question made by the record, therefore, is whether the Legislature has authorized the Street Railroad Company to appropriate this bridge to its use in the manner claimed by it, without the county's consent, and without making it compensation."

After discussing the authorities, the court holds that the Legislature, unless restricted by the State Constitution, may, even without the consent of the municipality and without allowing it compensation, authorize railroads to be laid in its highways. It adverts to the fact, that the bridge was built by the County Authorities, and in a sense owned by them (though managed, with their consent, by the city of Rome), and it declares, that public property of such character is held by the local authorities, in trust for the general public as represented by the General Assembly, which has full power to control the use of public property, except so far as limited by the State Constitution. Two Georgia cases are cited in support of this conclusion.

Thus it appears, that the Georgia courts fully sustain our contentions, as to the scope and extent of the franchise granted. Having done so in litigation between the owner of the franchise and these same County Authorities, the matter becomes *res judicata*, and it is so pleaded in the *bill*.

In *Detroit* v. *Detroit Citizens St. R'y Co.*, 184 U. S. 395, this court referring to previous litigation between same parties, said:

> "The case above cited in the Circuit Court of Appeals for the Sixth Circuit, it will be noticed, is between the same parties as the case at bar, and if the judgment therein had been pleaded or put in evidence upon the trial of this action, we can not now see why it would not have been *res adjudicata* between the parties in this suit upon that question, at least as to the particular road then under discussion."

Independently of *res adjudicata* we shall demonstrate from this court's decisions that in this case the State has no power to revoke or alter the franchise granted, or to impair the vested contract rights created as a result thereof, *without the consent* of the owner of such franchise or vested rights.

Claim of Waiver or Abandonment.

In the court below the County Authorities contended that the owners of the franchise in question have waived or abandoned their vested contract rights and in lieu thereof have accepted a different arrangement of a revocable nature.

Let us examine the facts.

The claim is made, that subsequently to the decision in 1887 above mentioned, the Rome Street Railroad Company abandoned its impregnable position under that decision, and substituted therefor a contract with the County Authorities, made February 25, 1892, the effect of which contract was to surrender the franchise, already sustained by the Supreme Court. This would be a remarkable proposition in any case. Of course, we must consider the action of the parties in the light of common sense. By way of presenting the whole situation, the amended bill states (Rec., pp. 17 and 18) exactly what was done.

The same facts were before the Georgia Supreme Court in the case of City Electric Railway Co. v. Floyd County, 115 Ga. 655, decided in 1902 and the opinion in that case sheds light upon the whole situation. We prefer to state the facts as shown by that court.

It appears from the opinion (115 Ga. 655), that in 1892 when the Rome Street R. R. Company was about to change from a horse car line to an electric car line, the County Authorities contended that such change would greatly increase the servitude upon the bridges and the risk of danger, etc., and, therefore, demanded some compensation for such increased use and danger. The right to compensation was denied but to settle the controversy on the subject the agreement of February 25, 1892, was made.

Under this agreement the Rome Street R. R. Company, agreed to pay the County Authorities annually the sum of $100.00 for each of the three bridges used by it. The opinion recited that it appeared from the testimony in the record that this annual payment of $100.00 for each bridge

> "was believed to be barely sufficient to cover the actual added expense and damage to said bridges by reason of such unusual and extra burdens."

It nowhere appears that the County Authorities *then* denied the *legal right* of the company *to cross* the bridges with its cars and indeed they could not deny such right after the decision in 77 Georgia. At most, they could only claim a right to *regulate* the manner of using the bridges. In making such regulations, they had power to annoy the owner of the franchise even though they could not annul its franchise. Accordingly, the parties settled upon certain regulations as to the kind of rails to be laid on the bridges and the speed of the cars in crossing same, and the company also agreed to so arrange its wires and tracks as not to prevent the use of the Fifth Avenue bridge as a swing bridge.

The company further agreed that it would indemnify the County Authorities against suits for damages resulting from its cars and wires. In this particular, its agreement was nothing more than the law would have exacted of it, in any event.

The circumstance of a change (authorized by its charter) from horse power to electric power in the operation of its cars could not affect the Company, even if its charter had not expressly authorized such change. (See cases hereinafter cited, pp. 27 and 44.)

Now can it be said, that this agreement of 1892 with the *County Authorities* in any manner modified the contract theretofore expressed in the franchise granted by the *General Assembly?* The parties to the contract of 1892 are not the same as the parties to the original franchise. The payments agreed upon were mere contributions to a maintenance charge, a mere aid to the County Authorities in discharging their obligation under the law to keep the bridges in repair. There is nothing in the contract which indicates a surrender by the company of its *Legislative* franchise and it had no occasion in law to contract with the *County Authorities* with reference thereto. It did not in fact do so.

We submit this is the only sensible interpretation that can be placed upon the contract. It is not a substitute for the franchise theretofore owned by the company, and certainly is not a waiver or surrender thereof.

The Rome Street R. R. Company having become insolvent and its property being sold, the purchaser, the City Electric Railway, found this annual contribution of $300.00 too burdensome for it and evidently the County Authorities recognized that fact, because on February 3, 1896 (Rec., p. 18), they made a contract with the City Electric Railway Company under which, the amount, which that company had been theretofore paying under the contract of its predecessor in title, was reduced from $300.00 per annum ($100.00 for each of three bridges) to $200.00 per annum for all three bridges. In all other substantial respects the 1896 contract of the City Electric Railway Company is the same as the 1892 contract between the County Authorities and the Rome Street Railroad Company.

Exactly the same observations apply to these two contracts, with this exception:

After the City Electric Railway Company had paid under the contract for several years, it declined to make further payments upon the ground that the *Legislative* franchise, acquired by it from the Rome Street Railroad Company, entitled it to go upon these bridges without making any payment. The County Authorities sued the City Electric Railway Company upon its 1896 contract and recovered a judgment for the amount then due thereunder. The case was taken to the Supreme Court of Georgia which affirmed the judgment in *City Electric Railway Company* v. *Floyd County,* 115 Ga. 655. In its opinion, the court referred to its former decision in 77 Ga. 614, and, while approving same and indicating its adherence to the views there expressed, it said, that this was a separate controversy between the *County Authorities* and the *City Electric Railway Company;* that independently of its rights, the Rome Street R. R. Company first and the City Electric Railway Company thereafter, had agreed with the County Authorities to make a stipulated annual payment and that this settlement of a dispute between them must be respected and enforced by the court.

There is absolutely nothing in this opinion in 115 Ga. 655, which detracts from the binding force of the former decision in 77 Ga. 614. On the contrary, the court reiterates its adherence to the view there expressed, but says that, independently of that, the Railway Companies had made a compromise of the claims asserted by the County Authorities and they must pay according to the terms of such compromise.

There is no intimation that such compromise with the *County Authorities* operated to modify the contract between the *State of Georgia* and the Street Railroad Companies. As a matter of law it can not do so.

Counsel for the County Authorities sought in the court below, to make some capital of the word "lost" used by the Georgia Supreme Court in its opinion in 115 Ga. 655. It is true this word "lost" is used in the opinion but it must be read in the light of the context. When so considered, it can not be taken to mean a surrender to the State by the Company of the franchise to cross these bridges. At most it meant a mere composition of differences existing between the County Authorities and the Companies.

In *Minneapolis* v. *Minneapolis St. R'y Co.,* 215 U. S. 417, the City claimed that the Railway Company operating under a *Legislative* franchise, had lost the benefits of its charter right to collect five-cent fares through its acceptance of a *city ordinance* authorizing *a change from horse power to electric power* in the operation of its railway. This court denied this claim of the City and the substance of its decision is thus stated in the syllabus (p. 418):

> "and a public service corporation accepting an ordinance *permitting change from horse to electric power does* not abandon its rights under the original

> ordinance so that they are no longer protected by the contract clause of the Constitution. * * *
>
> "Waiver to a reasonable extent of certain privileges under a franchise does not withdraw the other privileges from the protection of the contract clause of the Constitution."

So in *Blair* v. *Chicago,* 201 U. S. 400, the same question was involved and the substance of this court's decision is thus stated in Item 9 of the Syllabus (p. 403):

> "Whatever rights existed in the streets, were not lost to the companies by the acceptance of the ordinances granting a change from animal to cable or electric power in the operation of the railways."

CONTRACTS REPUDIATED BY COUNTY AUTHORITIES.

Moreover, consider the position of the County Authorities in this case. They are *not now relying* upon this contract, which, they now claim, was substituted for the franchise granted by the Legislature to the Rome Street Railroad Company. They are not seeking to recover compensation at the rate of $200.00 per year for the use of these three bridges.

On the contrary, they have repudiated that contract. They are trying to collect a lump sum 375 times as great as the annual charge fixed in the contract. Now can it be, that the County Authorities are allowed to blow both hot and cold with reference to this contract? Can they rely upon it when they have repudiated it? Does not their repudiation of it restore the parties to the original position occupied by them before the contract was made?

If the contract is a nullity so far as the County Authorities are concerned, it is equally void as to the Railway Company. This is true, whatever may have been its effect before the County Authorities repudiated it and demanded, in lieu of an annual charge of $200.00, a lump charge of $75,000.00.

We submit, there is no justification for contending, that the Railway Company, or either of its predecessors in interest or title, has, in any way or at any time, lost or surrendered the franchise, granted by the General Assembly, or consented to its alteration or repeal.

III.

The franchise, thus acquired by the Railway Company, is not subject to any condition of revocation or amendment, without consent of the owner, and is unlimited in its duration. It constitutes a vested right or contract, protected by the Contract Clause of the Federal Constitution from impairment by any power of the State.

As we understand the position of our opponents, they concede that, under *Floyd County* v. *Rome Street Railroad Company*, 77 Ga. 614, cited *supra*, it is not within the power of the *County Authorities acting alone* to repeal or revoke the franchise granted by Legislative Act but they contend that the *Legislature* has such power, and has exercised it in passing the Act approved August 15, 1914.

On the other hand, we contend there is *no power* in the State of Georgia to repeal or affect the vested rights of the Railway Company under its franchise.

The above proposition can best be discussed under these phases, namely:

(1) Where the franchise has not been acted upon and rights thereunder have not vested.

(2) Where rights have vested and no power of repeal or amendment is reserved in the grant itself or any general law of the State.

(3) Where the attempt at repeal or amendment is based solely upon the exercise of the police power.

Let us consider these phases in the order stated:

WHERE THE FRANCHISE HAS NOT BEEN ACTED UPON AND RIGHTS THEREUNDER HAVE NOT VESTED.

It is unnecessary to dwell on this phase. The franchise in this case was promptly accepted and large sums of money have been expended on the faith of it through a period of more than thirty years past. We mention this point merely for the purpose of distinguishing those cases, which turn upon it, *e. g:*

> *N. Y. Elec. Lines* v. *Empire City Subway,* 235 U. S. 179.
> *Macon R. R. Co.* v. *Gibson,* 85 Georgia, 1.

WHERE RIGHTS HAVE VESTED AND NO POWER OF REPEAL OR AMENDMENT IS RESERVED IN THE GRANT ITSELF OR IN ANY GENERAL LAW OF THE STATE.

This is our case:

The Act granting the franchise contains no provision for revocation, alteration or amendment. It fixes no limit of time for its duration. No section of the Georgia law was cited in the court below, under which the power of alteration or repeal was reserved. In fact, by the Constitution of 1877 (Appendix I, p. 1), the Legislature is *expressly prohibited* from revoking such franchise, where to do so would work injustice, as shown in this case, to the corporators or creditors of the corporation.

This provision of the Georgia Constitution was adopted shortly after a decision by the Georgia Supreme Court in *Railroad Company* v. *Georgia* (subsequently affirmed by this court in 98 U. S. 359), in which it was held under *then* existing provisions of the Georgia law, that all such corporate franchises were subject to repeal at the legislative will.

Appreciating the disaster which would befall the State, if persons seeking investments were advised that any franchise, granted to a corporation, is subject to revocation or amendment at the whim or caprice of any legislative body, the Georgia Convention of 1877 was careful to adopt the above provision. Manifestly, this was done for the express purpose of safeguarding franchises, on the faith of which, investments are made by corporators and creditors. Its object would be utterly destroyed, if the orders of the County Authorities in this case are upheld.

There being no reserved power of repeal or amendment, the Contract Clause affords full protection to the franchise.

No State shall pass any law impairing the obligation of a contract. This applies to a Sovereign Convention of the State as well as to a Legislative or Municipal Body.

This court has had before it so many phases of this question that we can not better state our position than by citing some of its many decisions on the subject.

State Constitution Void Under Contract Clause.

There are many cases annulling sections of State Constitutions because violative of the Contract Clause. We shall cite only one—a franchise case.

Russell v. Sebastian, 233 U. S. 195-210.

In this case the court held (p. 210) that an amendment to the Constitution of California was ineffectual to impair a franchise granted under the original Constitution.

The case involved the franchise of the Economic Gas Company to use the streets of Los Angeles. It was granted in 1909 under authority from the Constitution of California. Subsequently, in 1911, the Constitution was amended and the city of Los Angeles refused to allow the Gas Company to exercise its franchise unless it would comply with certain terms and conditions authorized or required under the Constitution as amended.

The Gas Company, under its original franchise, had the right to extend its mains through all the streets of the City. It had invested large sums of money in its plant and had been serving the public for some years before the amendment was adopted.

Thereafter, the City on October 26, 1911, passed two ordinances; one forbidding the exercise of any franchise to lay or maintain gas or water pipes in the streets without first obtaining a grant from the City in the manner therein prescribed, and the other providing a penalty for anyone making an excavation in the streets without a permit from the City.

An employe of the Gas Company was arrested for violation of the latter ordinance. On a writ of *habeas corpus* the Supreme Court of California *held that the amendment of the Constitution in 1911 operated to repeal any right or franchise theretofore granted* to the Gas Company, *as to extensions* of the Gas Company's mains or pipes to *streets not already occupied* by it. It therefore remanded the employe (Russell) to custody. Upon writ of error this court reversed the judgment of the California Supreme Court, holding as follows:

(1) The Gas Company had a contract or franchise under the Constitution of California to lay its mains and pipes for gas and water through the streets of Los Angeles; that this right in no way depended upon any action of the City or of the State Legislature; that relying thereon, the Gas Company had expended large sums of money in the construction of its plant, etc.; that in doing so, it had accepted the constitutional grant of franchise and that such grant was not a mere license or easement but that it (p. 204):

> "constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution,"

It was further said that this right

> "is not open to dispute in view of the repeated decisions of this court."

(2) It was further held, that when the grant became effective by acceptance, it became effective as an *entirety* and the range of acceptance or limits of the grant were not to be measured by actual user. This court declared that such grant must be construed in a fair and reasonable way and under such construction the grant must include and did *include all* the streets of Los Angeles, imposing upon the Gas Company the correlative duty to supply the reasonable needs of citizens demanding an extension of service under reasonable conditions.

(3) In conclusion this court said (p. 210), that the sovereign power of California, in amending its Constitution, can not impair a franchise granted prior to such amendment.

Legislative Acts Void Under Contract Clause.

There have been numerous cases in this court annulling Legislative attempts to repeal unconditional franchises theretofore granted by Legislative authority. We shall cite only a few of them, some earlier, some later in time. Even a list of them all would be too lengthy for insertion.

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650.
New Orleans Water Wks. Co. v. Rivers, 115 U. S. 674.
Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683.

These are all cases in which a public utility company claimed an *exclusive* franchise under a Legislative grant. In each case, the Legislature, by a subsequent Act charter-ing a rival company, sought to impair the franchise previously granted.

This court held in each case that the subsequent Act of the Legislature was void under the Contract Clause and that the only way in which the State could resume control over an unconditional franchise, originally granted by it, is to exercise the power of Eminent Domain, making compensation for the property thus taken.

Carondelet Canal Co. v. Louisiana, 233 U. S. 362.

The syllabus of this case thus states the point:

> "The repeal of a law which constitutes a Legislative contract is an impairment of its obligation."

Vicksburg v. Vicksburg Water Wks. Co.,
206 U. S. 496-516.

In this case, the Water Company had a franchise granted under authority of the Legislature in 1886 for a term of thirty years. In 1900 the Legislature passed another Act which had the effect of impairing the franchise granted under the Act of 1886. Litigation ensued, in which this court, as well as the Supreme Court of Mississippi, held that the original franchise was protected, under the Contract Clause, from impairment by any subsequent action of the State. On this point, this court said (p. 508):

> "That a State may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt." (Citing authorities.)

This court quotes at length from the opinions of the Mississippi Court in various cases, sustaining the power of the State to make such a contract and upholding its validity and binding force when made.

Blair v. Chicago, 201 U. S. 470.

In this case the general principle is thus stated (p. 470):

> "While it is true that if by the Act the State had conferred a grant of the right to use the streets for the period of ninety-nine years, entitled to the protection of the Contract Clause of the Constitution, *such right could not be impaired by any subsequent legislation,* it is worthy of note," etc. (that in the particular case the grant did not extend for a period of ninety-nine years).

Municipal Ordinances Void Under Contract Clause.

Under this head, *we shall first cite one case* in which a municipal ordinance sought to repeal a franchise granted under Legislative Act. Of course, the ordinance was held void. The other cases relate to municipal ordinances attempting to repeal franchises granted under previous municipal ordinances. They were likewise held void.

Louisville v. Cumberland Telephone, etc., Co.,
224 U. S. 649-664.

This case involved a franchise to construct a telephone line in the streets of Louisville, Ky., granted by Legislative Act to the Ohio Valley Telephone Company in 1886, and assigned by that company to the Cumberland Company in January, 1900.

The charter contained a provision requiring the Telephone Company, before locating its lines in the streets, to obtain the consent of the City Council. This consent was granted by ordinance in 1886. The ordinance prescribed certain regulations as to the erection of poles and wires, etc. Except as stated, there were no further limitations upon the grant, material for present consideration, either in the Legislative Act or in the ordinance.

Subsequently, in 1909, the city undertook to repeal the ordinance of 1886 giving its consent to the location of the telephone lines in its streets. Thereupon the Cumberland Company, as assignee of the Legislative franchise brought suit in the U. S. Circuit Court at Louisville to protect its franchise rights, alleging that a large amount of money had been expended on the faith thereof. The Circuit Court granted the injunction and this court affirmed its judgment, holding,

(1) The Legislative charter granted a perpetual franchise regardless of any limit upon the life of the company. The vitalizing power in this grant came from the Legislature. The City Council had nothing to do in the matter except to give or withhold or condition its assent to the location of the Telephone Company's lines in the streets. Having given its assent without condition, except as above stated, the Legislative grant became perfected as a perpetual franchise which the City could not revoke. This franchise was a property right which could be assigned to the Cumberland Company.

(2) The City ordinance of 1909 attempting to repeal the ordinance of 1886, which gave consent to the exercise of the franchise, was an attempt to impair the value of the franchise. As such it was a violation of the Contract Clause of the Federal Constitution, even though the City had no power to repeal the Legislative grant.

Detroit v. Detroit Citizens Street R'y Co.,
184 U. S. 368-399.

This is a leading case. It outlines not only the rights of the parties, but the procedure in the United States Courts to enforce such rights. We shall cite it at some length because the opinion solves many questions that might be raised in the instant case.

The Street Railway Company, by assignment from its predecessors in interest, held a franchise by direct Legislative grant under general statutes of Michigan. These statutes authorized the Railway Company, with the consent of the municipal authorities, to construct and operate its lines in the streets of the city and to extend same through adjacent villages and townships with their consent. The necessary consent was given. There was nothing in the Legislative Act, which prescribed the rates of fare to be charged, further than to say that *such rates* should be *established by agreement* between the company and the corporate authorities. There was another Act under which municipalities were authorized to prescribe *regulations* for the use of the franchise.

The case involved several franchises originally granted to different companies. A typical franchise was granted for a period of thirty years and subsequently extended. There was Legislative authority for the original grant and the extension, and under such authority the rates of fare were to be *fixed by agreement* between the company and the City. In its ordinances granting its consent to the original franchise and to the extension thereof, the City of Detroit prescribed a five-cent fare. Acting upon the faith of this ordinance and of the Legislative authority therefor, the Company built and equipped its line of railway, expending a vast sum of money in doing so.

Thereafter the City of Detroit, by ordinance of 1899, sought to reduce the rates of fare. The Company objected, claiming that the ordinance of 1899 impaired the obligation of its contracts under the various franchises granted and ordinances previously enacted. It brought suit in the United States Court to enjoin the enforcement of the City ordinances reducing fares and a decree being rendered against the City, it appealed to this court, where the judgment of the court below was affirmed.

The opinion of this court settles the following propositions:

(1) A court of equity has jurisdiction to grant relief by enjoining the enforcement of an ordinance or Legislative Act which impairs the obligation of a contract expressed in a franchise.

(2) It is proper in such a suit in equity to join with the municipality the officers charged by law with the enforcement of its ordinances.

(3) The Legislature, unless prohibited by the Constitution of the State, has power to authorize a contract between the municipality and a street railway company as to rates of fare and such contract, for the period specified therein, is binding upon the City. On this point, the court says (p. 382):

> "The contract once having been made, the power of the city over the subject, so far as altering the rates of fares or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract."

(4) The rights thus acquired, under a contract thus authorized and made, are not mere licenses and can not be revoked during the term of the contract. On page 384 this court said, "it would be hardly credible" that anyone would invest money in a venture subject to change at the caprice or pleasure of the city authorities.

Referring to the various acts and ordinances involved, this court said (p. 389):

> "The rate of fare having been fixed by positive agreement under the expressed Legislative authority, the subject is not open to alteration thereafter by the Common Council alone, under the right to prescribe from time to time the rules and regulations for the running and operation of the road."

By using the language above quoted, "the Common Council *alone,*" the context of the opinion shows *that the consent of the Street Railway Company was required* before an alteration of its contract with the City could be made.

(5) Referring to the Legislative Act which prohibited the construction of a street railway through a city except "under such regulations and upon such terms and conditions as said authorities may from time to time prescribe" (p. 383), this court said (pp. 397-398):

> "The right from time to time to make such further rules, orders or *regulations* as to the Common Council may seem proper, can not be held to extend to the *alteration of a contract* as to the rate of fare which shall be charged for the transportation of passengers. We think, as was stated by the court below, that this reservation permitted the city to make further rules or regulations than those contained in the ordinances, in regard '*to all matters incident to the construction and operation of the road,* such as the location of the tracks in the streets, the placing of switches and turn-tables, the repair of the pavement between the tracks, the removal or limitation of the number of tracks, in the interest of public travel, the frequency with which cars should be run for the public convenience, the stopping of cars at street crossings, the use of fenders, the rate of speed to be maintained, the sale of tickets, *and generally to details of the conduct and operation of the railway,* which experience might show to be necessary, in addition to or in amendment of those specified in the consent, for the *protection of life,* the *accommodation of the public,* (p. 398) and the *avoidance of injury* to private property. Such regulations are not invasions of the contract rights of the company and are just and reasonable' ".

Again, this court said (p. 398):

> "But aside from that and considering only the nature of the right itself growing out of the agreement as to fares, we are of the opinion that not one of the reservations of the right to make further rules

> or regulations could by any fair construction be held to include the right on the part of the city at its own pleasure to reduce the rates of fare agreed upon in those ordinances."

There are other points covered in the court's opinion but they are alluded to elsewhere and need not be repeated.

City Railway Co. v. Citizens Railroad Co., 166 U. S. 557-571.

This case involved a franchise to operate a street railroad in Indianapolis. The franchise was granted under a Legislative Act which required the company to first obtain the consent of the Common Council to the location and construction of its street railway over the public streets of the City. Such consent was granted by the City in 1864 "for the time and on the conditions hereinafter prescribed." The time prescribed was "the full time of thirty years," and one condition was that the cars should be operated *with animal power only* (p. 560).

Later, an ordinance was passed, and accepted by the company in 1890, authorizing the use of electric power, after which the company proceeded at very great expense to change its plant to an electric system.

In the meantime, there had been an assignment of the original franchise.

In 1893 the City undertook, by contract with another street railway company, to grant certain rights amounting to an impairment of the original franchise. Its owner thereupon sued in the Federal Court, alleging an impairment of its vested rights. A decree sustaining the original franchise, and enjoining its impairment, or destruction was rendered by the Circuit Court and sustained by this court with a slight modification as to duration of the franchise.

The opinion settled the following propositions:

(1) The case presented a Federal Question.

(2) A contract existed between the complainant and the City which the City could not impair.

(3) The Legislative Act of 1891, known as the new City Charter, did not have the effect of repealing or amending the original Act of 1861 under which the original company acquired its franchise rights.

(4) The City was estopped from questioning its contract, consenting to a seven-year extension of the franchise, because the company, upon the faith of such extension, had issued and sold bonds to investors, whose investment might be destroyed, if the extension of the franchise were annulled.

With reference to the original franchise, the court said, p. 567:

> "The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, *became a contract which the State was not at liberty to impair during its continuance;* but if, at the expiration of the thirty years, the road had been sold to another company, and that company

> had applied for and obtained from the Common Council a franchise to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose."

(5) The court further held that the *substitution of electric power for animal power,* in the operation of the street railway under an ordinance amending the original ordinance, could not be treated as a surrender of any rights granted under the original ordinance, even though the city did not have the power to enact such ordinance when passed and obtain same through a later Act of the General Assembly. On this point the court said (p. 569):

> "In view of the large expenditures incurred by the company upon the faith of this ordinance, it is ill becoming the city to set up its own want of power to make it, when such power was directly and explicitly given a few months thereafter."

(6) In conclusion, the court held that there was a valid contract with the original company which was protected from impairment by the Federal Constitution.

Boise, etc., Water Company v. Boise City, 230 U. S. 84-98.

This case involved a franchise granted to a water company by Boise City. The grant was within municipal authority under the general laws of Idaho. There was no limit of time fixed in the grant. The franchise thereby created was assigned by the grantee and a large amount of money expended in the construction of a plant for supplying the city with water. Subsequently, the City undertook by ordinance to exact from the Water Company a monthly license of $300.00 for the exercise of the franchise previously granted by it, contending that such franchise was nothing more than a revocable license. Litigation ensued in the Federal Court in Idaho and that court sustained the City's claim in part. The case was brought to this court on writ of error and this court reversed the judgment in favor of the City, holding (pp. 92-93):

> "The plain effect of this later ordinance was to impair the obligation of the contract resulting from the ordinance conferring the street easement. The court below erred, therefore, in instructing the jury to allow the counterclaim."

Minneapolis v. Minneapolis Street R'y Co., *215 U. S. 417-437.*

This case has been referred to (*ante*, p. 27) upon another point.

The Railway Company was organized in 1873 and in 1875 it made a contract with the city of Minneapolis, expressed in an ordinance subsequently ratified by Legislative Act in 1879. Under this contract the Railway Company claimed a fifty-year franchise to operate its street railway lines, charging five-cent fares. In 1907 the city passed an ordinance requiring the company to sell six tickets for a quarter. By suit in the Federal Court, the company sought to enjoin the enforcement of the latter ordinance, as an impairment of its contract rights under the original ordinance, which had been ratified by the

Legislature. The Circuit Court granted the injunction sought and this court affirmed its judgment, with a slight modification as to time. Passing over the points already noted, this court held:

(1) That a franchise may lawfully be granted for a period extending beyond the corporate life of the grantee.

(2) That the power reserved in the original ordinance to control "the construction, maintenance and operation of said lines of street railway" does not include power to regulate rates of fare and an ordinance attempting to do so is an impairment of the contract embodied in the former ordinance.

There are many other cases in this court to the same effect and there are numerous cases in the inferior Federal courts dealing with various phases of this question. We take the liberty of citing one case from an inferior court.

Des Moines City Railway v. Des Moines, 151 Fed. 854.

In this case the Railway Company asserted a contract with the city giving it a perpetual franchise over its streets. The city passed an ordinance denying such franchise and requiring the Railway Company to remove from the streets its tracks previously laid. The Railway Company filed its bill in the Federal Court for an injunction to protect its franchise and the court granted the relief sought.

In addition to other points covered by the opinions cited *supra,* the Circuit Court in this case decided these two propositions of interest in this case:

(1) A resolution of the City Council directing the removal of railway tracks from the streets of the city, is a law of the State within the meaning of the Contract Clause.

(2) Federal jurisdiction to enforce rights claimed under the Contract Clause, is not impaired or affected by the fact that the State Constitution also contains a similar clause prohibiting such impairment of contract rights.

WHERE THE ATTEMPT AT REPEAL OR AMENDMENT IS BASED SOLELY UPON THE EXERCISE OF THE POLICE POWER.

There are numerous cases where the State or local authorities have vainly attempted to repeal franchises *under pretense* of exercising the police power. We shall cite only a few of them.

Owensboro v. Cumberland Telephone, etc., Co.
230 U. S. 58-83.

In this case, the City of Owensboro by ordinance of 1889 granted the Telephone Company a right to use the city streets for telephone poles and wires. The ordinance contained no limitation as to time but did contain certain regulations as to the use of the streets and certain conditions as to furnishing telephone service to the City authorities.

In 1909 the City passed an ordinance requiring the Cumberland Telephone, etc., Co. (assignee of the original franchise) to remove its poles and wires and provided that the Mayor should have them removed, if the Telephone Company failed to do so within a reasonable time. The repealing ordinance contained a proviso strikingly similar to the orders of the County Authorities made under color of the Legislative Act of August 15, 1914, relied upon in the *instant* case, as a repeal of the franchise rights granted by the State of Georgia to the Railway Company. This proviso was as follows (p. 61):

> "that said company shall have the right to purchase from the said city a franchise authorizing it to maintain said poles and wires and use same as provided under the laws of the State, upon proper conditions to be prescribed by an ordinance to be passed upon request of said company to the Common Council of said city."

The Telephone Company, declining to remove its poles or to buy a new franchise, brought suit in the Federal Court to protect its rights under the old franchise. A decree in its favor was affirmed by this court, which pointed out (p. 72) the moral dishonesty of *pretending to exercise the police power,* in the repeal of a franchise, and at the same time *creating a new franchise for the same purpose,* and offering it for sale to the *same person.* In deciding the case, this court held,

(1) The right conferred under the ordinance of 1889 was not a mere license but it was a property right, saying (p. 65) that this question

> "has been too many times decided by this court to need more than a reference to some of the later cases."

(2) The franchise thus created came from the State, through power delegated by the State to the City. It was a right in perpetuity, in the absence of any limitation contained in the franchise. The court further said (p. 66):

> "If the grant be accepted and the contemplated expenditure made, *the right can not be destroyed by Legislative enactment or city ordinance based upon Legislative power,* without violating the prohibitions placed in the Constitution for the protection of property rights."

(3) That the power given in the City charter "to *regulate* the streets, alleys and sidewalks and all improvements and repairs thereof," included the power to grant a franchise to the telephone company (p. 69), but does not include the power to repeal the franchise, *after it has been acted upon* (p. 72), unless the power to repeal was clearly and unmistakably reserved.

(4) The power reserved in the ordinance granting the franchise to alter or amend it "as the necessities of the city may demand," is a mere reservation of the *police control* of the streets and of the mode and manner of placing and maintaining the poles and wires incident to the unabridgeable police power of the City (p. 72).

(5) The general power in the City Charter "to make, publish and repeal ordinances" must relate to ordinances of a governmental character and not those of a contractual nature. To uphold the power of repeal under such circumstances, in the language of the court (p. 73),

> "would be to place every contract made by the city by virtue of an ordinance, Legislative in form, subject to the mercy of changeable city councils. * * * We think no such extraordinary power is to be implied."

Grand Trunk, etc., Railway v. South Bend, *227 U. S. 544-559.*

This is a very important case, very much in point.

This case came up from the Supreme Court of Indiana, which upheld an ordinance partly annulling a franchise claimed by the Grand Trunk. This court reversed the Indiana Court and held that the franchise in question constituted a contract which the State of Indiana could not impair.

The facts were these: In 1866, the State of Indiana granted a charter to the Grand Trunk's predecessor in title, authorizing the construction of a railroad through South Bend. The Indiana law required the City's consent. In 1868 the City of South Bend passed an ordinance, granting consent for the company to construct its railroad through the streets of the City, no more than one track to be laid, except that the privilege was granted to lay a double track along Division Street between certain points. The road was constructed and a single track built in 1871. Thereafter the company acquired from abutting owners some additional property and laid a second track on Division Street for about half the distance authorized by the original ordinance.

In 1901 the business of the company had increased, so as to require additional double track facilities, and it was proceeding to extend its double track along Division Street for the full distance authorized by the ordinance of 1868, when the city objected and repealed so much of the ordinance of 1868, as gave consent to a second track in Division Street.

The Grand Trunk, having acquired the franchise, brought suit in the State Courts to protect its rights thereunder. The State Courts decided against it on the ground that the suit involved only the right to build the *additional* double track (and not the removal of the double track already laid), and that even if the original grant constituted a contract, it did not prevent the city, *in the exercise of its police power,* from prohibiting the laying of the additional trackage in Division Street.

In other words, as stated by this court (p. 551):

> "The action of the city was sustained (by the State courts) on the ground that the repeal was presumptively a reasonable exercise of the police power, and not a Legislative impairment of the contract ordinance."

The similarity between the Grand Trunk case and the *instant case* is heightened by the fact that, in each case, the franchise came directly from the Legislature, subject only to the proviso that the City would give its consent. This court said, on the authority of the Indiana cases and of its own decisions, that, when the consent was given, a valid contract had been created, which was binding and enforceable according to its terms.

The question next arose as to the right of the City, in the exercise of the police power, to withdraw its consent or to amend or repeal the rights originally granted.

The opinion analyzes the authorities relied upon to support the right of repeal as an exercise of the police power, and holds that the *police power* must be construed as a *power to regulate*, and not as a *power to destroy*.

It distinguishes the Viaduct cases, on the ground that they did not deny the *right to use* the streets, but merely *controlled* the manner of using them (pp. 552, 553). It concedes the authority of the City, in the proper exercise of the police power, to legislate as to crossings, grades, character of rails, rate of speed, signals and details of operation, holding that these matters were mere *regulations of the use* of the franchise.

It puts all Viaduct cases in the same category, and declares, that in the proper *regulation* of the *use* of a franchise, the municipality might require the tracks of a railroad company to be lowered or elevated or to be removed from the center to the side or from the side to the center of the streets (p. 553). It holds, however, that *regulation* is a very different thing from *destroying or taking away* the franchise. With reference to the illustrations just cited, it uses this language (p. 553):

> "These, however, are examples of the persistence of the power to regulate and do not sustain the validity of the repealing ordinance of 1901, since it is *not regulative* of the use, *but destructive*, of the franchise."

On page 554 it draws this sharp distinction:

> "The difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and

the undoubted right of government to contract as to some matters and the want of power, when such contract is made, to destroy or impair its obligation. *New Orleans Gas Co.* v. *Louisiana Light Co.,* 115 U. S. 650.

"The State, with its plenary control over the streets, had this governmental power to make the grant. There was nothing contrary to public policy in any of its terms, and being valid and innocuous, the police power could not be invoked to abrogate it as a whole or to impair it in part. *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, 17. Tracks laid in a street, under Legislative authority, become legalized, and, when used in the customary manner, can not be treated as unlawful either in maintenance or operation. As said by this court, 'a railway over the * * * streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded.' *Baltimore & Potomac R. R. Co.* v. *Fifth Baptist Church,* 108 U. S. 317, 331."

Again the court says (pp. 554-555):

"The inconvenience consequent upon the running of a railroad through a city, under State authority, is not a nuisance in law, but is insuperably connected with the exercise of the franchise granted by the State. If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure.

"*The power to regulate implies the existence and not the destruction of the thing to be controlled.* And while the city retained the power to *regulate* the streets and the use of the franchise, it could *neither destroy* the public use *nor impair* the private contract, which, as it contemplated permanent and not temporary structures, *granted a permanent and not a revocable franchise.* Both the street and the railroad were arteries of commerce. Both were highways of public utility, and both were laid out subject to the authority of the State, though the power to regulate the use of the streets has been delegated to the municipality."

Again (pp. 555-556):

> "It is said, however, that even if the city could not prevent the use of the rails already laid, it could repeal so much of the ordinance as related to that part of the street on which the double track had not been actually built. But this was not a grant of several distinct and separate franchises, where the acceptance and use of one did not necessarily execute the contract as to others not connected with the main object of the ordinance and not at the time directly within the contemplation of the parties. *Pearsall* v. *Great Northern R. R.,* 161 U. S. 646, 673. This franchise was single and specific, and when accepted and acted upon became binding,—not foot by foot, as the rails were laid—but as an entirety."

and again (p. 556):

> "The ordinance passed in pursuance of the Indiana statute was an entirety. *When accepted it became binding in its entirety.* If the city has the right to repeal the specific provisions of the contract, it has the like right to repeal the more general grant to lay a single track. If South Bend can do so, every other municipality having granted like rights, under similar ordinances, and affecting every line of railway in the country, can repeal the franchise to use double or single track. On the ground of congestion

> of traffic, the State's grant and command to operate a continuous road could be nullified by municipal action, to the destruction of great highways of commerce, similar in their nature to the street itself. Such consequences, though improbable, *are rendered impossible* by the provision of the Constitution of the United States prohibiting the impairment of the obligation of a contract by legislation of a State, whether acting through a General Assembly or a municipality exercising delegated Legislative power."

Old Colony Trust Co. v. Omaha, 230 U. S. 100-122.

This case involves a franchise granted to an Electric Light Company by the city of Omaha, in 1884, and subsequently mortgaged by its assignee to the Trust Company. In the ordinance granting the franchise, the City *reserved the right to order the removal* of poles and wires from public streets or alleys, *when a necessity therefor should be declared to exist.*

Thereafter a controversy arose between the Electric Light Company and the City, resulting in the adoption by the City of a resolution *requiring such removal* of the company's poles and wires from the streets.

The Trust Company, as mortgagee of the property, that would be destroyed, if this resolution were enforced, brought suit in the Federal Court to enjoin such enforcement. The lower court decided in favor of the City, holding, apparently, that the original franchise was a mere license, revocable at the will of the City. This court *reversed* the court below and granted the relief sought by the Trust Company. In doing so, it held:

(1) That the original grant by the City Council to the Electric Light Company, not being limited in time, was a grant in perpetuity and not a mere license.

(2) That the *reservation* in the original grant of a right to order the removal of poles and wires from the public streets or alleys, when a *necessity therefor* should be declared to exist, did not make the franchise a mere revocable license (pp. 116-117); that the power to order a removal must be based upon *public necessity* and not merely upon an arbitrary desire to destroy the property right. The opinion points out that no such public necessity was shown to exist by the ordinance or by the answer or the evidence in the case. It therefore enjoined the enforcement of the resolution, which ordered the removal of the poles and wires, holding that the trustee of the mortgage was entitled to such relief.

Stanislaus County v. San Joaquin, etc., Co.,
192 U. S. 201-217.

The San Joaquin, etc., Co., was a water company organized under the general statutes of California, which gave to it a franchise of such a nature, that it amounted to a contract with the State, which could only be altered or amended pursuant to power retained or reserved to that end in the Constitution or legislation of the State. In this connection, this court said (p. 213), citing the *Knoxville Water Company case,* 189 U. S. 435, that *there is a limitation even to the power of amendment when reserved* in the Constitution or a statute of the State; that even where such power exists,

> "the alterations must be reasonably made, in good faith and consistent with the scope and object of the act of incorporation, and that *sheer oppression and wrong could not be inflicted under the guise of amendment* or alteration; that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases are surrounded by the same sanction and are as inviolable as in other cases."

Walla Walla v. Walla Walla Water Company, 172 U. S. 1-23.

The City of Walla Walla, pursuant to Legislative authority, passed an ordinance granting a franchise to a water company, which accepted the franchise and expended large sums in exercising the rights and discharging the duties thereby created.

Subsequently, the City undertook to establish its own water plant. In doing so, it impaired the franchise previously granted by it to the water company which brought a suit to protect its rights. This court, affirming a judgment of the lower court against the City, announced the following principles, in addition to those already noted:

(1) That the owner of a franchise thus sought to be impaired is not obliged to aver specifically how his property will be damaged but the court will take judicial notice of necessary consequences.

(2) While the police power can not be bartered away by any contract or ordinance or Legislative Act, yet such power must be restricted to subjects properly falling within its limits, such as the health and morals of the public. The court recognizes (pp. 16 and 17) the power

of the City to regulate the manner in which the pipes or mains of the company should be laid or to control the purity of the water supply, because these are proper subjects of police power. It adds, however (p. 17):

> "But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power can not be invoked to abrogate or impair it."

We insist that under this court's decisions, the Railway Company is clearly entitled to the protection afforded by the Contract Clause to its vested franchise rights.

IV.

The Railway Company is also protected in its franchise to use these bridges by the Due Process Clause of the Federal Constitution.

The points made and authorities cited under Proposition III render it unnecessary to argue this proposition.

If the Railway Company has *a vested right* to use the bridges in question, free from any condition of revocation or alteration, such right can only be taken away by the State through the exercise of its power of Eminent Domain.

This has been time and again held in the Rate Cases. It was so held in a Franchise case, *New Orleans Gas Co. v. Louisiana Light Co.,* 115 U. S. 650-673, and in many later cases.

Likewise in a Street Railway case, *Ashland Electric, etc., Co.* v. *Ashland,* 217 Fed. 158-160.

V.

The Railway Company is further secured by the Equal Protection Clause of the Federal Constitution against the arbitrary and oppressive exactions and demands of the County Authorities in this Case.

The application of the Equal Protection Clause to the rights of the Railway Company is not so obvious as the application of the Contract Clause or of the Due Process Clause. However, the Equal Protection Clause does apply, if an attempt should be made to sustain the demand of the County Authorities as the levy of a tax.

Taxing Power Not Really Involved.

It has been suggested that the demand of the County Authorities might be sustained, as an exercise of the taxing power. Whatever may be the scope of the taxing power, it is sufficient to say that no attempt has been made, in this case, to exercise that power. Nothing in the Legislative Acts cited, or in the orders passed by the County Authorities, savors of the taxing power. All the essentials of a valid tax (*e. g.,* assessment, opportunity to be heard, inquiry as to benefits, etc.) are wanting in this case.

The charge made is not even in the nature of a charge for the upkeep of the streets. That would be a maintenance charge, recurring periodically, as an offset to depreciation or wear and tear resulting from the use of the streets or public property.

There has been no opportunity afforded to the Railway Company *to be heard,* upon the question of what would be a fair and proper sum to be paid by the Railway Company as a periodical charge or otherwise for the use of these bridges. The County Authorities simply met and passed orders, *arbitrarily* demanding of the Railway Company, one-third the cost of each bridge.

If the Act has any effect claimed for it, it simply attempts to repeal the franchise of the Railway Company in violation of the Contract Clause and the Due Process Clause.

Void Arbitrary Charge.

If, however, we are mistaken in our construction of this Act and its application; if it attempts to exert the taxing power of the State, then, in its application, it violates the Equal Protection Clause. It is a mere arbitrary exaction, designed for the purpose of raising revenue, regardless of benefits conferred.

As such, it is utterly void, not only under the Due Process Clause, but under the Equal Protection Clause, in that it seeks to *arbitrarily* impose upon one company more than its fair share of the public burden.

> *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S. 478-485.

In *St. Louis, etc., Land Co.* v. *Kansas City,* 241 U. S. 419, this court states the general doctrine (p. 429):

> "It is true that all taxes and assessments are made by some rule of apportionment. Where the scheme of distribution is palpably arbitrary and constitutes a plain abuse, it may be condemned as violative of the fundamental conceptions of justice embodied in the Fourteenth Amendment." (Citing authorities.)

As a matter of fact, it is not easy to conceive of a State Law violating the Due Process Clause, which is not equally a violation of the Equal Protection Clause.

Street Paving Cases Distinguished.

An attempt was made to draw an analogy between the *instant* case and those cases where street railway companies are called upon to pave the streets between their tracks and for a short distance on either side. This analogy falls when we consider the facts of the case.

As a matter of fact, there are some reasons why a street railway company might justly be required *to repair* that portion of the public streets occupied by its tracks. It is not to the interest of any railway company to have its tracks torn up or its transportation facilities disrupted while the streets occupied by its tracks are being *repaired* by persons not under its control. However, this is a very different thing from forcing the Railway Company to build, either in whole or in part, a bridge for the use of the general public. Such a charge can not be imposed unless authorized by the franchise of the Railway Company.

In this connection, we note, for the purpose of distinguishing it, the recent case of *Southern Wisconsin Railway* v. *Madison*, 240 U. S. 457-462.

In that case a Street Railway Company, in Madison, Wis., obtained its franchise, through an ordinance of the City, which, at the outset, required it to pave the space between its rails and for a distance of one foot on either side, and to keep such space in condition corresponding with the rest of the street. Subsequently, a new ordinance was passed giving to the Railway Company additional rights, but not repeating the provisions as to paving contained in the earlier ordinance. The Railway Company claimed that the earlier ordinance was superseded in all its terms by the later ordinance and therefore claimed an exemption from the burden of paving the street to correspond with the pavement laid down by the City in the rest of the street.

Litigation ensued, in which the Supreme Court of Wisconsin held that the Railway Company was under a contract obligation, arising out of its original franchise, to do the work required of it. This court affirmed that judgment.

In other words, the court, looking to the original ordinance, held that it imposed an obligation from which the City had not consented to release the Railway Company.

In this case, the Railway Company stands upon the terms of its original franchise and insists that it has never consented to assume any greater obligation. When the case is analyzed, it supports the position here taken by the Railway Company.

VI.

The Railway Company is further protected by the Constitution of Georgia, in the enjoyment of the franchise rights acquired by it, upon the faith of which, its corporators and its creditors have invested their money.

This court, having jurisdiction for the purpose of adjudging the rights of the Railway Company under the Federal Constitution, will proceed with the whole case and adjudge the rights of the parties under the Constitution and laws of Georgia.

In *Siler* v. *L. & N. R. R. Co.,* 213 U. S. 175, Federal jurisdiction was conferred (there being no diversity of citizenship) solely by reason of a case stated under the Due Process Clause. In the course of the inquiry, a *question arose* as to the rights of the parties *under the laws of Kentucky.* The lower court, inquiring into such rights, fixed a construction upon the law of Kentucky which necessitated a judgment against the defendants. On appeal, this court approved the lower court's construction of the Kentucky law and affirmed its judgment without considering any of the Federal rights involved.

TERMS OF GEORGIA CONSTITUTION.

There are two provisions of the Georgia Constitution (Appendix I, p. 1). Georgia Const., Art. 1, Sec. 3, para. 3 (Ga. Code of 1911, Sec. 6390):

> "*Revocation of grants.* No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation."

Ga. Const., Art. 1, Sec. 3, para. 1 (Ga. Code of 1911, Sec. 6388):

> "Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid."

Effect of Georgia Constitution.

We shall not dwell upon the last provision relative to the taking of private property. It is essentially the same as the Fourteenth Amendment.

Nor shall we comment at length upon the provision relating to the revocation of grants. We have discussed that section sufficiently (*ante*, p. 31).

Clearly, a public franchise under the Constitution of Georgia is safer from attack than any of those which this court has had occasion to consider in the many cases already cited.

VII.

The Act of August 15, 1914, upon which the County Authorities rely, when properly construed, does not authorize the imposition upon the Railway Company of the oppressive and arbitrary burdens laid upon it by the County Authorities.

This brings us directly to the construction of the Georgia statute, relied upon by the County Authorities (Appendix VII, pp. 13 to 19).

In this connection, only Sections 2 and 4 of the Act are material for consideration. The other sections deal with the question of jurisdiction and control over the bridges and the procedure to condemn and remove the old bridges and to build new ones.

Looking then to Sections 2 and 4 of the Act, it is apparent that the Legislature had in mind two classes of corporations, namely:

(1) Corporations already having a franchise to use these bridges.

(2) Corporations that might hereafter acquire such franchise.

With reference to the first class (those already having a franchise to use the bridges), it will be observed that their rights are affected only by Section 2 and the last clause of Section 4 of the Act.

With reference to the second class (those not already having a franchise to use the bridges) their rights are affected only by Section 4.

Bearing in mind these manifest distinctions, let us construe the Act of 1914, with reference to the rights of these two classes respectively, observing the *cardinal rule* in the construction of statutes that the court will, if possible, so construe a statute as to render it constitutional rather than unconstitutional.

Section 2, Applying to Existing Franchises.

Observe that the first part of this section relates generally to franchises *heretofore* granted. When we come to the latter part, we find it quite limited in its application. These franchises *are not revoked or repealed absolutely* but the attempt to revoke is limited not only to the use of future bridges, but *even as to such future bridges,* is qualified by these words:

> "unless the said companies will conform to the *reasonable* terms and conditions required by the County Authorities."

In other words, by Section 2, the Legislature has said (*so far as it has power,* under the Constitution of the United States and the Constitution of Georgia), it will revoke the franchise of the Railway Company to go over the new bridges *unless* the Railway Company will conform to the "*reasonable* terms and conditions" required by the County Authorities.

There is no pretense of an attempt to revoke the Railway Company's franchise *except* to the qualified extent above stated. If the Railway Company should discard all its rights under the Constitution of the United States and the Constitution of Georgia, it could still properly contend that before its right to go upon the new bridges could be denied the County Authorities must first prescribe "*reasonable* terms and conditions" and the Railway Company must then refuse to comply therewith.

Construed in this way, the County Authorities can not destroy the rights of the Railway Company by prescribing *unreasonable* terms and conditions or by making, as it has made, arbitrary exactions or demands upon it.

Now assuming that the County Authorities have the right to prescribe "*reasonable* terms and conditions" notwithstanding the protection afforded the franchise of the Railway Company by the Federal Constitution and by the Constitution and laws of Georgia, what does this mean?

Manifestly, it means that the County Authorities have permission under the Legislative Act, *to regulate the manner* in which the franchise may be used or the bridges may be used by the Railway Company in the *operation* of its cars. Thus construed, the Act of 1914 gives to the County Authorities the right to prescribe *regulations* as to the manner in which the tracks may be laid, or the wires suspended; the rate of speed at which cars shall be moved over the bridges, etc.; in other words, the same general rights which are involved in the exercise of the police power and which have been recognized by this court in the cases already cited.

> Detroit v. Detroit Citizens R'y Co., 184 U. S. 397-398.
> Grand Trunk Railway Co. v. South Bend, 227 U. S. 553.
> Owensboro v. Cumberland Tel. Co., 230 U. S. 72.
> Walla Walla v. Walla Walla Water Co., 172 U. S. 16.

We insist that Section 2 does not confer any other or further powers upon the County Authorities to prescribe terms and conditions for the exercise, by the Railway Company of its existing franchise.

If the phrase "*reasonable* terms and conditions" could possibly be extended to include *a maintenance charge* (such as had previously been fixed by contract between the County Authorities and the Railroad Companies set forth, *ante*, pp. 23 and 25, even this would give ***no right to demand a lump payment*** of one-third the cost of the bridges.

At most, the County Authorities could "reasonably" require of the Railway Company no more than compensation year by year for the *extra burden* placed upon the bridges, through its part of the public travel. Even this would be an added burden impairing the franchise and whatever foundation it might have in "reason," it would be wholly without foundation in law.

Section 4, Applying to Future Grants.

The County Authorities, in their construction of the Act, have distorted the Legislative will and have applied to the Railway Company, a section of the Act, never intended to apply to a franchise *already existing.*

Section 4 gives to the County Authorities exclusive right *hereafter* to grant franchises over these bridges. In such *future* grants the County Authorities are authorized to require, as the price of access to the new bridges, the payment by any future railway company of a sum *not exceeding* one-third the cost of such bridges.

As to *future* companies and *future grants* to them, no Federal right would be violated by such a provision. In the first place, it is strictly a matter of contract between the County Authorities and any future company desiring in the future to acquire a franchise over these bridges. In the second place, every practical man knows that the County Authorities would hardly demand of a new company, struggling into existence, the payment of anything like one-third the cost of these bridges. At most, they would only ask the payment of an annual maintenance charge based upon use.

They have presumed to demand of the Railway Company this enormous sum, because they know its investment has already been made and they assume that by threatening to divide its line into four parts they can force its corporators and creditors to give it $75,000 in a lump sum for the privilege of exercising the franchise they already have.

Because the Railway Company and its predecessors have served the City of Rome and Floyd County for more than thirty years, paying taxes and building up the community, as stated in the Grand Trunk case (227 U. S. *556*), its investors are to suffer a penalty many times greater than would be imposed upon a new company seeking to serve the people.

Not only so, but unless the Railway Company *now has a franchise* or contract, protecting it from the threatened exaction, it can not be safe after submitting to this exaction. If the State of Georgia can force it *now* to pay one-third the cost of these bridges, it may, within a year after such payment is made, repeat the process and require another payment of a like amount, and still another, until the entire cost of the bridges may, by successive exactions, be collected from the Railway Company, simply because the State and County Authorities conceive that it is able to pay.

Said King Rehoboan to his people (I Kings XII; 14):

> "My father made your yoke heavy and I will add to your yoke; my father also chastised you with whips, but I will chastise you with scorpions."

Not only does Section 4 show that insofar as it permits the County Authorities to assess a charge not exceeding one-third the cost of these bridges, it is restricted to new franchises, but the concluding sentence in Section 4 absolutely excludes from the preceding part of the section all existing franchises, such as the Railway Company owns and asserts in this case. We quote as follows from the latter part of Section 4:

> "But any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the Board of Commissioners and the terms of this Act."

We have already analyzed the terms of this Act and have discussed the "*reasonable* conditions" which the County Authorities, under the Act, are permitted to impose. We now insist that the Legislative Act which has been distorted by the County Authorities into an instrument of grave injustice to the Railway Company, does not, when fairly construed, afford any sort of legislative sanction for their arbitrary and oppressive demands in this case.

Their construction of the Act, however, makes a Federal question. Whether it presents a Federal question or not, this court, under the authority of the Siler case, 213 U. S. 175, will reverse the judgment of the lower court for error in approving such a construction of the Act of 1914.

VIII.

The County Authorities, acting under color of Legislative sanction, have so construed and applied the Georgia Act of August 15, 1914, as to impair the vested rights of the Railway Company, in violation of the Federal Constitution and of the Constitution and laws of Georgia.

Under the preceding heads, we have discussed so many phases of this general question, that we forbear further repetition. We simply call attention to those numerous cases already cited, where it is held that a resolution or order of local authorities charged with the enforcement of the State's laws, must be treated as the Act of the State, where done under color of authority from the State. Thus treated, the case presented is one of Federal rights invaded and the Federal courts have jurisdiction accordingly.

Louisville v. Cumberland Tel. Co., 224 U. S. 649.

OPINION OF THE DISTRICT COURT.

This opinion is in the Record (pp. 23 to 27). It consists almost entirely of a review of the Act of 1914. It expreses some doubt (p. 26) as to the *application* of the Act to corporations *already having franchises,* but, without arguing that point, it seems to assume that the County Authorities have the right to require the Railway Company to pay one-third the cost of the bridges as one of the "*reasonable* requirements" for its occupancy of them.

Without further considering the proper construction of the Act of 1914, the Opinion sustains that Act, as passed in the exercise of the police power, and seems to regard *the police power* as justifying the State and the County Authorities *in impairing or destroying* the Railway Company's *franchise.* Moreover, the Opinion indicates that the Railway Company *did not have a vested right* to use these bridges. It does not point out the defects in the franchises, nor does he explain away the decision in 77 Georgia, 614, *holding that a vested right did exist,* nor does it allude to the Georgia Constitution or to any of the cases from this court or from any other court, denying to the State Authorities the right to impair a franchise which has once vested without condition.

For these reasons, we have found some difficulty in analyzing or discussing the opinion of the lower court. However, we think the citations already made from this court's opinions, will sufficiently answer the conclusions reached by the learned District Judge.

CASES DISTINGUISHED.

We had no opportunity in the court below to see the brief of counsel for the defendant. Of course, we have as yet had no such opportunity in this court. However, at the oral argument in the court below, counsel seemed to rely almost entirely upon these authorities:

The Georgia Act, approved August 15, 1914.
Macon R. R. Company v. Gibson, 85 Ga. 1.
City Electric R'y Co. v. Floyd County, 115 Ga. 655.
Railroad Company v. Georgia, 98 U. S. 359.
C., M. & St. P. R'y Co. v. Minneapolis, 232 U. S. 430-442.

We shall consider these in the order given.

Georgia Act of August 15, 1914.

We have already reviewed this Act at length (*ante*, pp. 64-70). We shall not repeat what we have said on that point.

Macon Railroad Co. v. Gibson, 85 Ga. 1.

This case requires little further attention. (See *ante*, p. 30.) There is grave reason to doubt the authority of the case under the decisions of this court (Grand Trunk R'y v. South Bend, 227 U. S. 544; Russell v. Sebastian, 233 U. S. 195), but it is not necessary for us to question it. That case turned upon the court's view that the rights of the R. R. Company *had not vested* before the repealing Act was passed. Certainly no such contention could be made in the *instant* case. After the decision in 77th Georgia, affecting this identical franchise, we can not conceive that the Georgia Supreme Court would hold the doctrine in Macon R. R. Company v. Gibson applicable to this case.

City Electric R'y Co. v. Floyd County, 115 Ga. 655.

We have already commented upon this case (*ante*, pp. 23-26). We shall add nothing to what has been said.

Railroad Company v. Georgia, 98 U. S. 359.

We have already alluded to this case (*ante*, p. 31), and have distinguished it by showing that the Constitution of Georgia was changed, *before the rights of the Railway Company in this case accrued*, and that such change was made for the express purpose of escaping the effect of the decision in *Railroad Company* v. *Georgia*, where this court was controlled, by the *then* existing provisions of the Georgia Law, in the construction of a repealing Act.

C., M. & St. P. R'y Co. v. Minneapolis, 232 U. S. 430-442.

This case was much relied upon in the lower court. It is the case, in which this court affirmed a judgment of the Minnesota Supreme Court that required the C., M. & St. P. R'y Co., at its own expense, to make an opening under its tracks through the Minneapolis Park System in order to permit the passage of water-craft from lagoons on one side of the railroad track to lagoons on the other side of the railroad track.

The principle announced in the Minneapolis case is not at all new in this court, as shown by the opinion itself. This court treats the Minneapolis case as controlled by the Viaduct cases (*Nor. Pac. R'y Co.* v. *Duluth,* 208 U. S. 583, etc.). *All such cases are distinguished from the instant case* by the opinion of this court in *Grand Trunk R'y* v. *South Bend,* 227 U. S. 553.

It should be borne in mind, first of all, that no question of contract or franchise rights was involved or discussed in the Minneapolis case. The Contract Clause was not involved in that case. Federal jurisdiction hinged entirely upon the Due Process Clause.

As to the Viaduct cases (and the Minneapolis Canal case is in principle exactly like the Viaduct cases) this court's opinion in the Grand Trunk case shows that there was occasion for the exercise of the police power in order to promote the public convenience and to protect the public safety. In the *instant* case, as in the Grand Trunk case, no question of public safety or convenience is involved. There is simply an attempt by the County Authorities to make the Railway Company pay for a privilege it already has. As shown in the Grand Trunk case and also in the Cumberland Telephone case, 230 U. S. 72 (both of which have been cited, *ante*, pp. 48 and 52) the pretense of repeal, in the exercise of the police power, is a mere sham, because in the *instant* case, as in the Cumberland Telephone case, there is an offer by the County Authorities to let the Railway Company go back on the bridges provided it will again buy and pay for the privilege it already has.

The Grand Trunk case, as pointed out (*ante*, pp. 50-55), emphasizes the distinction between police power, which *regulates the* use, and simple piracy, which robs the Railway Company.

In the Minneapolis case and in the Viaduct cases, there is no attempt to say to the Railroad Company that it must keep off the streets until it buys another right to go on the streets. The *right* of use is recognized, but the *manner* of use is regulated. Instead of crossing the highway at grade, or occupying with its embankment the place where a canal is to be constructed for public necessity or convenience, the Railroad Company is required to so exercise its right to use the streets or its waylands as not to interfere with or absolutely prevent the exercise by the public generally of concurrent rights.

Clearly, in the Viaduct cases, the city had a right to open highways across the waylands of the Railroad Company. If it did not have this right, all growth in the community would be stopped. Now what does the city do in such cases? It condemns the crossing or establishes the highway, if none has been theretofore established. It says to the Railway Company: "You have a right to use this intersection and the public has a right to use it. Your use of it is of such a character that, unless a viaduct is built separating the grades of the railway and the highway, loss of life or damage to property may ensue."

Danger of accidents will involve the Railway Company in expense and liability quite as certainly as the separation of grades, but the situation must be handled in the interest of the public safety; so in the exercise of the police power, the city decrees, or orders by proper proceedings the building of a viaduct by the Railroad Company, and its order to this effect is sustained in the interest of the public safety or convenience.

Exactly the same principle applies to a greater extent in the case of the canal opened by the City of Minneapolis, because in the nature of things it was impossible to carry the canal over the railroad at the same grade. It had to be carried under the Railroad, *if any access at all from one lake to the other was to be afforded.* The city of Minneapolis had expended a large sum of money in establishing its park system, in order to promote health and comfort of its citizens, and it had a right to make its park system available for use by them. This right was not confined to the land embraced in the park. It included, of course, the bodies of water therein located, and the decision of the Minnesota Court was right, upon the principles recognized and established by this court, in Viaduct cases that are distinguished in the Grand Trunk case.

So in the *Old Colony Trust Co.* case, 230 U. S. 117, the court said, even where there was *a contract reservation of police power,* that there must be a real public necessity before franchise rights can be impaired or destroyed.

The authorities in point are uniform that such rights can not be taken away in an arbitrary manner and for an unreasonable cause.

Nothing in any of the foregoing cases supports the contentions of the County Authorities.

CONCLUSION.

Without attempting to summarize the foregoing argument, so greatly extended, we submit that we have established our right to a reversal of the judgment appealed from, with directions to the lower court to enter a judgment granting a permanent injunction against the County Authorities, restraining them from interfering in any way with the vested franchise of the Railway Company.

Respectfully submitted,
Linton A. Dean,
John C. Doolan,
Solicitors for Appellant.

J. Ed. Dean,
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Of Counsel.

APPENDIX TO BRIEF.

(CONTAINING GEORGIA LAWS CITED.)

I.

CONSTITUTIONAL PROVISIONS.

Georgia Constitution, Art. 1, Sec. 3, para. 3. (Ga. Code of 1911, Sec. 6390.)

"*Revocation of grants.* No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation."

Georgia Constitution, Art. 1, Sec. 3, para. 1. (Ga. Code of 1911, Sec. 6388.)

"Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid."

II.

GOVERNMENTAL POWER OF COUNTY AUTHORITIES.

(1) Governmental control over roads and bridges in Floyd County is vested in the Board of Commissioners of Roads and Revenues of that county created by Act of the General Assembly of Georgia, approved December 13, 1871 (Ga. Laws 1871-2, pp. 225, 226).

Section I of that Act establishes the Board, to be composed of five members, and fixes the term of office.

Section IV prescribes the powers and duties of the Board, so far as material to this case, as follows:

> "Section IV. That said board shall have exclusive jurisdiction, when sitting for county purposes, over the following subject-matters, to-wit: 1st—*Governing and controlling all property of the county, as they may deem expedient, according to law.* 2d—In levying a general tax for general, and a special tax for particular county purposes, according to the provisions of the Code and the laws of Georgia. 3d—*In establishing, altering and abolishing* all roads, *bridges,* and ferries, in conformity to law."

The other sections are not material for consideration.

(2) Authority to buy the bridges across the Etowah and Oostanaula rivers in the city of Rome is conferred upon the Board of Commissioners of Roads and Revenues of Floyd County by an Act approved September 23, 1881 (Ga. Laws 1880-81, p. 540).

Section III of the Act in question provides as follows:

> "Be it Further Enacted, That said Commissioners are hereby authorized to sell said bonds at not less than par, and with the proceeds *to purchase the bridges* across the Oostanaula and Etowah rivers at the city of Rome, for the use and benefit of said County of Floyd; Provided, that the said Commissioners shall have no power to purchase one of said bridges alone, but *shall purchase all of said bridges,* if any are purchased."

The other sections are not material for consideration.

III.

ORIGINAL CHARTER.

(Ga. Laws 1884-5, pp. 191-2.)

AN ACT TO INCORPORATE THE ROME STREET RAILROAD COMPANY AND TO DEFINE ITS POWERS, THE MAYOR AND COUNCIL OF THE CITY OF ROME HAVING GIVEN ITS CONSENT TO THE AUTHORITY HEREINAFTER GRANTED, SAID CONSENT BEING EVIDENCED BY A CERTIFIED COPY OF THE OFFICIAL ACTION OF THE SAID MAYOR AND COUNCIL EXHIBITED IN BOTH BRANCHES OF THE LEGISLATURE BEFORE THE PASSAGE OF THIS BILL.

Section I. THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA DO ENACT, That Joseph F. McGhee, B. I. Hughes, T. F. Howell, Daniel Lowery, and such others as may associate with them, and their successors and assigns, be, and they are hereby declared a body politic and corporate, by the name and style of the Rome Street Railroad Company, and in and by that name may sue and be sued, plead and be impleaded in any court of law or equity in this State, or where their rights may come in question; may have and use a common seal, and the same alter or destroy at pleasure, and purchase, hold, accept, enjoy or convey any property real, personal or mixed, that may be necessary for the purposes hereinafter set forth, or which they may acquire in the course of their business.

Section II. That said company shall have power and authority to survey, lay out, construct, and equip, use and employ street railroads in the city of Rome, and Floyd County, to-wit: From the railroad depot in East Rome, through Howard Street to Broad Street and through the whole length of said Broad Street, and along the extension of Broad Street to the bridge across the East Tennessee, Virginia and Georgia Railroad in the town of Forrestville, and also through South and Bridge streets, or any parts thereof, and through Court Street *and any other street in said city, and through any and all future extensions of said streets, or any of them,* and said company *may use as motive power* for their cars *horses or electricity,* or underground cables, driven by steam, *or any other appliance* that may hereafter be invented or used as motive power.

Section III. That the capital stock of said company shall be ten thousand dollars, which may be increased to the sum of one hundred thousand dollars should the business of the company require it, books of subscription for which shall be opened in the city of Rome. Said stock shall be divided into shares of one hundred dollars each, and be issued and transferred in such manner and upon such terms and conditions as the Board of Directors of said company may determine. Each share of one hundred dollars shall be entitled to one vote in all elections and meetings held by the stockholders.

Section IV. That all corporate powers of said company shall be vested in and exercised by a Board of Directors, and such officers and agents as said Board shall appoint, which said Board of Directors shall consist of five members, who shall be stockholders in said company, the first Board of Directors to be elected at such time and in such manner as said corporators, or a majority of them, may determine, and annually thereafter by the stockholders of said company. Said directors shall hold office until their successors are elected and qualified, and they may fill any vacancy that may happen in the Board by death, resignation, or otherwise. They may also adopt such by-laws, rules and regulations for the government of said company and the management of its affairs and business as they may think proper, not inconsistent with the laws of this State and of the United States.

Section V. That said Rome Street Railroad Company may convey on their lines passengers or freight, as the exigencies of the business community and public wants may require, and may charge reasonable and just rates for such transportation.

Section VI. That all laws and parts of laws in conflict with this Act, be and the same are hereby repealed.

Approved December 12, 1884.

IV.

FIRST AMENDMENT TO CHARTER.

(Ga. Laws, 1884-5, pp. 235-6.)

AN ACT TO AMEND "AN ACT TO INCORPORATE THE ROME STREET RAILROAD COMPANY, AND TO DEFINE ITS POWERS, THE MAYOR AND COUNCIL OF THE CITY OF ROME HAVING GIVEN ITS CONSENT TO THE AUTHORITY HEREINAFTER GRANTED, SAID CONSENT BEING EVIDENCED BY A CERTIFIED COPY OF THE OFFICIAL ACTION OF SAID MAYOR AND COUNCIL EXHIBITED IN BOTH BRANCHES OF THE LEGISLATURE BEFORE THE PASSAGE OF THIS BILL," APPROVED DECEMBER 12, 1884, SO AS TO AUTHORIZE SAID COMPANY TO EXTEND ITS LINES OF STREET RAILROAD THROUGH ALL THE STREETS OF THE TOWNS OF DESOTO, FORRESTVILLE, EAST ROME AND SOUTH ROME, IN FLOYD COUNTY, GEORGIA, AND ALSO TO EXTEND ITS LINE OF STREET RAILROAD TO A DISTANCE OF NOT EXCEEDING FIVE MILES FROM THE CORPORATE LIMITS OF THE CITY OF ROME, ALONG AND UPON ANY PUBLIC ROAD LEADING INTO SAID CITY, AND FOR OTHER PURPOSES. * * *

WHEREAS, The corporate authorities of the towns of East Rome, South Rome, Forrestville and DeSoto, in Floyd County, in this State, have consented thereto, as evidenced by certified copies of the official action of said towns exhibited to this General Assembly as required by law: therefore, SECTION I. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THIS STATE, That from and after the passage of this Act, the Rome Street Railroad Company, in addition to the powers heretofore granted to it, shall be, and it is hereby authorized and empowered to extend its lines of street railroad through and along any and all of the streets, lanes and alleys of the towns of East Rome, South Rome, Forrestville, and DeSoto, and shall also have the power and authority to extend its lines as much as five miles beyond the corporate limits of the city of Rome, along any public road leading into said city of Rome.

SECTION II. BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That the president and directors of the Rome Street Railroad Company, are hereby authorized to borrow money, issue bonds and mortgage its property and franchise to secure the payment of said bonds: Provided, that before said company shall extend its lines along any of the public roads outside of the corporate limits of said towns, they shall first obtain the consent of the Board of Commissioners of roads and revenue of said county of Floyd to do so.

SECTION III. BE IT FURTHER ENACTED, That all laws and parts of laws in conflict with this Act, be and the same are hereby repealed.

Approved October 7, 1885.

V.

SECOND AMENDMENT TO CHARTER.

(Ga. Laws, 1887, pp. 148-150.)

AN ACT TO AMEND AN ACT ENTITLED AN ACT TO INCORPORATE THE ROME STREET RAILROAD COMPANY AND TO DEFINE ITS POWERS, ETC., APPROVED 12TH DAY OF DECEMBER, 1884.

Section I. BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA, That said street railroad company may use as motive power for their cars, motors, commonly called dummy engines, propelled by steam, or any other steam motor that may be hereafter invented or used, which are, or may be as well adapted to the purpose as are dummy engines now in general use, on the following streets and along all or any part thereof, the said city and towns having already consented thereto, as evidenced by their official action exhibited to this General Assembly, to-wit: Broad, Howard, and Bridge streets in the city of Rome, the extension of Howard Street and such other streets in the fourth ward of said city as it may be necessary to use in reaching the present bridge, on Bridge Street, from the West Rome depot in said ward. When a new bridge is built at that site, and may pass over the bridges in said city, subject, however, to such regulations for the safety and convenience of the traveling public and the safety and preservation of the bridges, as may be prescribed from time to time by the Board of Commissioners of Road and Revenues of Floyd

County, the rate of speed not to exceed four miles an hour. No weight or load shall be carried on or over any of said bridges by said company that will subject the same to a greater stress than that shown to be safe by the strain sheets of said bridges and the tracks laid thereon shall be so arranged and kept by said company in such condition as not to interfere with free travel thereon for vehicles: Provided, however, that whenever a majority of the Board of Commissioners of Roads and Revenues of Floyd County shall by resolution, declare that the running of said engines and cars over any of said bridges has been found to be an interference with, or dangerous and unsafe to the traveling public thereon, or injurious to said bridges, then and in that event said company shall cease to run its engines across the same; said engines may also be used on the following streets in East Rome, South Walnut, Oak and Howard Avenues, and along the following public roads, to-wit: The road known as Dean Street to H. M. Tanners' residence, the portion of the Cedartown road lying between the property of the Rome Land Company, and that of B. A. Connelly, Miller & Sons, Hamilton Yancey, J. B. S. Holmes, and the Messrs. Jones, and through any and all portions of the lands of the Rome Land Company, providing said company shall consent thereto, with the right to use and cross the said public roads and to cross railroad tracks whenever and wherever it may be necessary to do so, to build a continuous line of road through said lands, and through the lands of any other person, provided such person shall first consent thereto, or just and adequate compensation is first paid to them. The right to condemn a right of way, not to exceed fifty (50) feet in width, over any and all lands, not occupied by buildings, that may be necessary and proper for said street railroad is hereby given to said company. The proceedings for such condemnation and the assessment of damages therefor shall be as hereinafter provided. Also, the following streets in South Rome: Pennington and Branham Avenues, Main Street and Cave Spring road as far south as the Mobley spring, and along Broad Street in Printup City and Forrestville to Printup City depot, and in any street or streets in the city of Rome or in said towns, provided, said city or town authorities shall first consent thereto, and provided that said company shall not lay its track in any public roads other than those herein named without the consent of the Board of Commissioners of Roads and Revenues of Floyd County, and the roads herein authorized to be used shall be left in good condition and of sufficient width for public travel. In no case shall the macadam or stone track or beaten track of said roads be taken or used for car tracks except to cross the same. The general law of force governing railroads, as to crossing public roads and railroads, shall apply to said street railroads as fully as if the same was an ordinary railroad.

SECTION II. BE IT FURTHER ENACTED, That said company shall have power and authority to extend its lines as much as five miles beyond the corporate limits of the city of Rome along any public road or street or any town adjacent to the city of Rome; Provided, that the consent of the Board of Commissioners of Roads and

Revenues of Floyd County shall first be had and obtained before any public road shall be taken or used for such purposes, and the consent of the town authorities shall first be had before any streets are taken or used for such purposes.

SECTION III. BE IT FURTHER ENACTED, That said company may own and hold any real estate that may be purchased by or conveyed to it for stations or parks in or near its line, and may embrace all such property in any mortgage hereafter, made under authority granted by Section II of the Act, passed October 7, 1885, amending the Act of incorporation of which this Act is amendatory.

SECTION IV. BE IT FURTHER ENACTED, That all disputed rights-of-way may be acquired by said company as provided by Section 1689 (1) of the Code of Georgia of 1882, and all the provisions of said section shall be held, taken and considered as a part of this Act so far as the same may be applicable.

SECTION V. BE IT FURTHER ENACTED, That all laws and parts of laws in conflict with this Act be, and the same are hereby repealed.

Approved September 21, 1887.

VI.

THIRD AMENDMENT TO CHARTER.

(Ga. Laws, 1889, pp. 696-7.)

AN ACT TO AMEND AN ACT ENTITLED AN ACT TO AMEND AN ACT TO INCORPORATE THE ROME STREET RAILROAD COMPANY, AND TO DEFINE ITS POWERS, ETC., APPROVED DECEMBER 12, 1884.

Section I. BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA, That the Rome Street Railroad Company shall not have the right to use steam power or dummy engines in crossing the county bridges, either for the transportation of freight or passengers across said bridges, except with the unanimous consent of all the Commissioners of Roads and Revenues of Floyd County, declared by public resolution in an official meeting.

Section II. BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That the Board of Commissioners of Roads and Revenues of Floyd County shall not have the right to grant any vested or contract rights to said Rome Street Railroad Company, or any other persons on or over said bridges, but may, in their discretion, grant temporary uses and privileges to said railroad company over said bridges, subject at all times to be revoked by said Commissioners.

Section III. BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That all laws and parts of laws in conflict with this Act be, and the same are hereby repealed.

Approved November 12, 1889.

VII.

ACT APPROVED AUGUST 15, 1914.

(Ga. Laws, 1914, No. 487.)

AN ACT:

To vest in Floyd County full and complete title, jurisdiction over and control of the following bridges within the city of Rome, in Floyd County, Georgia, to-wit: Second Avenue bridge spanning the Etowah River; Broad Street bridge spanning the Etowah River, and Fifth Avenue bridge spanning the Oostanaula River. To revoke any and all permits granted by legislative or municipal or county authority to any street railway company, electric light, telegraph, telephone or gas company, to lay tracks and operate cars on and over said bridges or to place wires or pipes and operate the same on and over said bridges.

To repeal all franchises heretofore granted to all such public service corporations to operate on and over said bridges, whether granted by legislative, county or municipal authority upon condition. To authorize the County Authorities of Floyd County to condemn and remove the present bridges and to build new bridges at the same points, and to authorize the county to acquire the necessary lands for the purpose of constructing bridges wide enough to meet the demands of public travel.

To authorize said county to require of any street railway company or electric railway company, desiring to lay its tracks on and operate its cars over said bridge, or either of them, to pay to said county a sum equal to one-third of the actual cost of building either of said bridges, before any company shall be allowed to lay tracks, place any wires or other equipment or operate any cars on or over such bridge or bridges, and to fix the rights of such corporation by reason of such payments.

To grant to the County Authorities of Floyd County the exclusive right and jurisdiction to grant permission and franchises to persons, firms and corporations, exercising public service functions, to operate on or over said bridges, and to prescribe the terms and limitations of such grants.

To provide that any person, firm or corporation, desiring to contest the validity of this Act, shall do so by injunction proceeding before the beginning of the work of tearing down and removing the old bridges and not otherwise.

To provide for the acceptance of this Act by the county and city authorities, and for other purposes.

Section 1.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, and it is hereby enacted by authority of the same, that from and after the passage of this Act, all rights, title and interest in the following bridges within the city of Rome, said county, to-wit: Second Avenue bridge spanning the Etowah River; Broad Street bridge, spanning the Etowah River; and Fifth Avenue bridge, spanning the Oostanaula River, together with full and complete jurisdiction over and control thereof, shall be vested in said County of Floyd, and be exercised by the County Authorities of said county.

Section 2.

Be it further enacted, That all permits and franchises heretofore granted, either by the General Assembly, the municipal authorities of the city of Rome, or County Authorities of Floyd County, to any street railway company, electric light, telephone, telegraph or gas company to lay tracks and operate cars on or over said bridges, or either of them, or to place *wires, pipes and equipment, and operate the same on and over said bridges, are hereby revoked and repealed so far as the same applies to any future bridges hereafter constructed under this or any other law unless the said companies will conform to the reasonable terms and conditions required by the County Authorities.*

Section 3.

Be it further enacted, That said County of Floyd is hereby authorized to condemn and remove the present bridges and to build new bridges at the same site and is allowed to acquire any necessary lands for the purpose of constructing bridges of sufficient width to meet the demands of the public travel, and all public service corporations, street railway companies, telegraph, telephone, light and gas companies, are required, when notified to do so, to remove all tracks, wires, pipes and other equipment from said bridges and each of them, as required by the County Authorities.

Section 4.

Be it further enacted, That the County Authorities of said county are hereby given the exclusive right and jurisdiction to grant permission and franchises to persons, firms and corporations, exercising public service function, to operate on and over said bridges, and to place railway tracks, thereon and to operate cars on and over said bridges and to prescribe the terms and limitations of such grants; and the County Authorities of said county are authorized to require of any street railway company or electric railway company as a condition precedent to the laying of tacks, placing wires and operating cars on or over said bridges, that it pay to said county a sum equal to one-third of the actual cost of the building of said bridges, and the sum shall be paid to the Treasurer of said county before any such company shall be allowed to lay any tracks or place any wires or other equipment or operate any cars on or over such bridge, *but any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the Board of Commissioners and the terms of this Act.*

Section 5.

Be it further enacted, That any railway company, electric railway company or other public service corporations, paying the sums required under and by the preceding section shall acquire only the same rights to operate on and over said bridges as they may have had on and over the streets leading to and from such bridges, and shall not be deemed to have any right, title or interest in such bridges or control over the same.

Section 6.

Be it further enacted, That any person, firm or corporation desiring to contest the validity of any part of this Act, shall do so by injunction proceeding before the beginning of the work of tearing down and removing of such bridges, and not otherwise. Notice shall be given all persons, firms and corporations of the time when work is to begin by publishing a notice thereof by the Chairman of the Board of Commissioners in the newspaper in which sheriff's sales are advertised. Said notice shall state the time when the work is to commence as near as practicable, and the estimate of the cost of each bridge. Said notice shall be published once a week for two weeks. The last publication to be at least 30 days before work is to begin. Any person, firm or corporation desiring to object to any terms of this bill, or to any change that may be made thereunder or the levy of any tax or any assessment or charge for building the bridge or bridges, shall file an injunction at least twenty days before the date the work is advertised to begin against the county stating the objections to the bill, which shall be heard as other injunctions are heard. And the work shall not begin until said injunction suit is finally determined.

Section 7.

This Act shall not go into effect until the Board of Commissioners of Roads and Revenues of Floyd County and the Mayor and Council of the city of Rome shall have both passed resolution accepting the terms of this Act.

Section 8.

Be it further enacted, That the Board of Commissioners shall before adopting the resolution putting this Act into effect, request the ordinary to call a special election referring to the people of Floyd County, the question of adopting or rejecting said Act. It shall be the duty of the Ordinary to call said election not less than 15 nor more than 30 days after receiving such request. Said election shall be called as special elections are called and those voting for such Act to go into effect shall have printed or written on their ballot the words, "For Bridge Act." Those opposed shall have "Against Bridge Act." The Ordinary shall consolidate the vote, and shall certify the result to the Board of Commissioners, who shall declare the result, and shall act accordingly.

Section 9.

Be it further enacted, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

Approved August 15, 1914.

Floyd County, Ga. et al
to Reply Brief for Appellants

Supreme Court, U. S.
FILED
JAN 26 1917
JAMES D. MAHER
CLERK

ADDENDA.

It may save labor for the court if we distinguish the cases cited in the supplemental and reply brief for appellees.

I.

Cases on Federal Jurisdiction.

West End, Etc., Co. vs. Atlanta, Etc., Co., 49 Ga., 151.
Central R. R. & B'k'g Co. vs. Ga., 54 Ga., 401.
Atlanta, Etc., Co. vs. Ga., 98 U. S., 359.

These cases all arose before the Constitution of 1877. Hence, they are not authority in this case.

Moreover, the West End case involves simply a claim by the Atlanta Company of an *exclusive* franchise which the court held was *never* granted. Therefore, there was no contract on that subject to be impaired.

In the Central R. R. & B'k'g Co. case, and also in the Atlantic, Etc., R. R. Co. case, the claim involved was merely an immunity from taxation, which is purely personal and subject to repeal, when a franchise essential to operation would not be subject to repeal (Morgan *vs.* Louisiana, 93 U. S., 217).

Newburyport Water Co. vs. Newburyport, 193 U. S., 565.
Gloucester Water Co. vs. Gloucester, 193 U. S., 580.
Defiance Water Co. vs. Defiance, 191 U. S., 184.

The district court, in the instant case, took jurisdiction. If the above cases apply, this court *must reverse* this judgment and order the bill dismissed for want of jurisdiction. All the cases sustain this obvious principle.

In the Newburyport and Gloucester cases, the water companies had franchises that were not exclusive. The cities were proceeding to establish their own plants, as they had the clear right to do, when the legislature passed acts requiring them to buy the existing plants *upon a specified basis* of valuation. These acts were for the benefit of the water companies and were invoked by them. Clearly they could not both invoke them and attack them. This is all the court decided. There was no other pretense of a Federal question.

In the Defiance case there was no impairment of contract. There was simply a denial of contract and a resolution by the City Council to test that question by lawsuit.

Owensboro vs. Owensboro Water Co., 191 U. S., 538.
Ennis Water Co. vs. Ennis, 233 U. S., 652.

In the Owensboro case there was simply a regulation of water rates by a city council, having clear power to regulate them. There was clearly no question under the contract clause. There was jurisdiction under the due-process clause and the case was retained to ascertain if the prescribed rates were confiscatory.

In the Ennis case there was no contract; consequently no case under the contract clause. Both the trial court and this court so held. No Federal ground being shown, the case was dismissed for want of jurisdiction.

Manhattan Life Ins. Co. vs. Cohen, 234 U. S., 123.

In this case the Federal question was not raised in the State courts. It was first injected into assignments of error in this court. Of course, it could not be considered.

Adirondack R. R. Co. vs. New York, 176 U. S., 335.

In this case the right of the railroad company to condemn certain land was taken away by a legislative act passed under reserved power to amend. This court held that it had no vested right in the continuance of that power simply on the idea that it might thereafter want to exercise it.

II.

Cases on Police Power.

C., B. & Q. R. R. Co. vs. Nebraska, 170 U. S., 57.

This case involved the apportionment by the city council between two railroads of the expense of *repairing* a viaduct theretofore built and paid for under a contract between the city of Omaha and the two railroad companies, made in 1886 pursuant to a statute of 1885. That contract dealt with *construction.* At the time the railroad companies were chartered there was an old statute of Nebraska requiring them to keep in repair all bridges and highway crossings above or beneath their railroad tracks. Moreover, by acts of 1887 and 1893 the city was authorized to order the *repair* of the viaduct at the expense of the two railroad companies, and the city council was expressly empowered to apportion this cost between the two railroad companies.

In exercising this power the city council was not acting as a judge between *itself* and the two railroad companies. It was a disinterested body, apportioning *between the two companies* their respective proportions of the expense of repair. The case involves no claim that the city should have paid a part of the cost.

This court's opinion shows (p. 73) that the contract for the construction of the viaduct did not impose liability upon the city to repair it. Whatever obligation to repair rested upon the city was an obligation imposed by general law which might be changed, and was an obligation owing not to the railroad companies but to the general public using the viaduct.

C., B. & Q. R. R. vs. Drainage Com'rs, 200 U. S., 561.

This case is, in principle, like the viaduct cases cited in our original brief. The railroad company was required to enlarge an opening beneath its tracks to permit the increased flow of water accumulated in a natural water course through drainage of swamp lands by a public ditch. This was merely "uncompensated obedience" to a police regulation in the interest of public health.

Mo. Pac. R. R. Co. vs. Omaha, 235 U. S., 121.

In this case the city council, in the exercise of its police power, required the railroad company to construct a viaduct over its tracks, and to make it strong enough to carry the tracks and cars of a street railway company. This was held to be a proper exercise of the police power, the use of the viaduct by the street railway company ***being treated as a part of the public use.***

There was ample authority for requiring the steam railroad company to pay the entire expense of the viaduct. There was *no authority* to require the street railway company to pay any part of it, and, therefore, the court said the rights of the steam railroad company were not invaded by the orders made.

With reference to the exercise of the police power this court said (p. 127; our italics):

> "So long as the means have a substantial relation to the purpose to be accomplished *and there is no arbitrary interference with private rights*, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety, which the legislature has duly enacted."

Detroit, Etc., R. R. Co. vs. Osborn, 189 U. S., 383.

This is simply a case of police regulation for the public safety at a grade crossing of a street railway track and a steam railroad track. Both companies were shown to be responsible in part for the danger to public safety, and both were required to participate in the expense of safety devices required by the State authorities. There was no question as to the obligation of the State to participate in the expense. It was simply an apportionment by the State between the two companies.

III.

Equity Rule No. 25.

Our bill as amended states all necessary facts. This court has held in the Walla Walla case, 172 U. S., 1, that the owner of a franchise is not obliged to aver specifically how his property will be damaged. If the franchise is impaired this court will take judicial notice of necessary consequences, especially when it is proposed to make, not a periodical charge for use, but a lump charge of $75,000.00 for a license, that appellees claim, may be revoked the next day, if they see fit to do so.

John C. Doolan
for Appellan

Rome Railway & Light Company, Appellant. *VS.* *Floyd County, Georgia, et al., Appellees.*	*In Supreme Court of the United States.* *October Term, 1916.* *No. 547.*

Now comes Floyd County, Georgia, appellee in the above stated cause, and moves the Court to advance the hearing of said cause, and give the same preference over other causes pending in said Court between private parties, and for grounds of said motion shows:

FIRST: That the State of Georgia is a party to said cause, in that said Bill of Complaint was filed against Floyd County, one of the political divisions of said State of Georgia.

SECOND: That the operations of the government of said Floyd County will be embarrassed and its financial affairs complicated by reason of the delay in the hearing and determination of said cause.

THIRD: That the people of the City of Rome, Georgia, and surrounding territory will be greatly inconvenienced and discommoded on account of the delay in the hearing and determination of said cause.

In support of the first ground of the above motion, provision is made for the sub-division of the State of Georgia into Counties, by Section 31 of the Code of Georgia of 1910, which is as follows, to-wit:

"The State is divided into One Hundred and Forty-six (146) Counties, whose boundaries and limits shall be ascertained by the several Acts laying off the same, and those amendatory thereto. The names of the Counties are as follows:" (Following the above is a list of the Counties, including Floyd County.)

In support of the second ground of said motion, movant shows that by the Act of the General Assembly of Georgia, approved August 15th, 1914, the validity of which is attacked in the Bill of Complaint, provision was made for the construction, by Floyd County, Georgia, of three bridges within the City of Rome, said State and County, to-wit: Second Avenue bridge, spanning the Etowah River; the Broad Street bridge, spanning the Etowah River, and the Fifth Avenue bridge, spanning the Oostanaula River; and Section 4 of said Act authorized the County authorities "To require of any street Railway Company or electric Railway Company, as a condition precedent to the laying of tracks, placing wires and operating cars on or over said bridges, that it pay to said County a sum equal to one-third (1-3) of the actual cost of the building of said bridges, and the same shall be paid to the Treasurer of said County, before any such Company shall be allowed to lay any tracks or place any wires or other equipment, or operate any cars on or over such bridge, but any corporation now having a franchise shall have the right to use any new bridge, upon complying with the reasonable conditions imposed by the Board of Commissioners and the terms of this Act."

In accordance with the terms of this Act, the County authorities proceeded to have estimates made of the cost of said three (3) bridges, which estimates aggregated the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, and to publish the notice stating the time when the work would begin and the estimate of the cost of each bridge Thereupon, in accordance with the method provided by the Act for contesting the validity thereof, appellant filed a Bill of Complaint, which was dismissed in the District Court, from which decision this appeal was taken. Contracts were let for the construction of the three bridges, aggregating a cost of Two Hundred and Twenty-five Thousand ($225,000.00) Dollars. The County of Floyd made provision to pay for these bridges, by issuing and selling bonds in the sum of Two Hundred and Twenty-five Thousand ($225,000.00) Dollars, same bearing interest at the rate of four and one-half (4½%) per cent. and being payable as follows: Five Thousand ($5,000.00) Dollars for each of the years 1916 to 1920 inclusive, and the balance in regular annual installments of Eight Thousand ($8,000.00) Dollars each, interest on the entire issue of bonds being payable semi-annually.

This involves the levying of a tax sufficient to bring in approximately Twelve Thousand ($12,000.00) Dollars annually, for the first five years, in order to pay the maturing bond and the accrued interest each year. The entire income of Floyd County, from all sources, is less than Two Hundred Thousand ($200,000.00) Dollars per annum. If the appellant in this case should pay the amount required of it by the terms of this Act, the same could be applied on the payment of these bonds and interest, and the tax payers of the County relieved of this expense, as was contemplated by said Act. Under existing conditions, however, the County authorities have no means of raising funds with which to pay maturing bonds and interest, except by a direct tax levy, which is already exceedingly burdensome, the State and County tax rate for the year 1916 being One and 40-100 ($1.40) Dollars on each One Hundred ($100.00) Dollars of assessed values.

In support of the third ground of the motion, movant shows that the City of Rome, Georgia, within the corporate limits of which City said bridges have been and are being constructed, is located at the confluence of the Etowah and Oostanaula rivers, forming the Coosa river. For approximately one mile above the meeting point of the Oostanaula and Etowah, they run almost parallel, being not more than one-half mile apart at any place within that distance. In this narrow tongue of land, between these two rivers, is located the business section of the City, the Post Office, the County Court House, the City Hall, and all other public buildings. The population of the City of Rome is approximately Fifteen Thousand (15,000) about two-thirds of whom reside across these rivers from the business section. Practically all of the manufacturing plants, in and around the City, are located across these rivers also. The only means of crossing the Etowah river is by the two bridges provided for in the Act of the General Assembly above referred to. and now being constructed. The bridge provided for across the Oostanaula river is nearest to, and is used by practically all of the population living across that river. The only other means of crossing that river is by a very inferior bridge at Second Avenue, and located at a considerable distance from the residence and manufacturing section on that side and across which there is no car line, and which would be unsafe for cars. The car lines of appellant extend out into these residence and manufacturing sections of the city. The line which would cross the Oostanaula river at Fifth Avenue, is about three (3) milees in length and extends through a large residence section and then on out to a manufacturing section. The line which would cross the Etowah river at Second Avenue, extends to the station of the Southern Railway Company and then on into a large residence section beyond, being about two (2) miles in length. The greater portion of railway travel into the city comes in on the Southern Railway. The line which crosses the Etowah river at Broad Street, extends through a residence section for about one mile, and then out through a manufacturing section for a distance of about three (3) miles to the town of Lindale, which has a population of about Five Thousand (5,000) people.

Under the terms of the Act, the payment of one-third (1-3) of the cost of the construction of these bridges is made a condition precedent to allowing any street railway company to lay its tracks on and cross the same with its cars. There is no other street railway company in the city and the people across the rivers and along the lines heretofore referred to, are dependent on the appellant in this cause for transportation facilities. The company is, in this bill of complaint, resisting payment, and pending the disposition of this cause in this Court, the people of the City of Rome and surrounding territory are very seriously inconvenienced and discommoded, as will readily appear to the Court, so that an early disposition thereof is extremely important.

WHEREFORE, The premises considered, movant prays that the hearing of this cause be advanced to as early a date as practicable and given preference over other causes pending in this Court.

JOEL BRANHAM,
MARK B. EUBANKS,
GEO. E. MADDOX,
Solicitors for Floyd County, Ga.

STATE OF GEORGIA, FLOYD COUNTY:

In person before the undersigned appeared J. Scott Davis, who being duly sworn, deposes and says that he is acting Chairman and Chairman pro tem of the Board of Commissioners of Roads and Revenues of Floyd County, Georgia, there being at present a vacancy in the Chairmanship on account of the resignation from office of the Chairman of said Board; and that the statements of fact set out in the foregoing motion, are true.

J. SCOTT DAVIS,

Acting Chairman and Chairman pro tem. of the
Board of Roads and Revenues of Floyd Co., Ga.

Sworn to and subscribed before me
this 20th day of October, 1916.

H. J. HINE, N. P. Floyd Co., Ga.

If the within motion to advance the hearing of the case is granted, we consent tha the case may be transferred to the Summary Docket, and Counsel for Applicant, Mr. John C. Doolan, also consents to that direction as shown by telegram from him, the original of which is attached, and is as follows: "Will make agreement suggested, namely- that case be put on Summary Docket for argument thirty minutes each side. You are authorized to make this statement to the Court".

This Oct. 30, 1916.

Joel Branham,
Mark B. Eubanks,
Geo. E. Maddox,
Solicitors for Appellee.

JAN 17 1917
JAMES D. MAHER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 547.

ROME RAILWAY & LIGHT COMPANY, - Appellant,

versus

FLOYD COUNTY, GEORGIA, ET AL., - - Appellees.

REPLY BRIEF.

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Of Counsel.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 547.

Rome Railway & Light Company, - - *Appellant,*

versus

Floyd County, Georgia, et al., - - - *Appellees.*

REPLY BRIEF.

May it please the Court:

In their brief, counsel for appellees state several propositions, relying upon one or more of them to distinguish this case from controlling decisions by this court.

These are reduced by the *concluding* paragraph of their brief (p. 21) to two in number, namely:

(1) That the County Authorities are under no obligation to construct the bridges in question or to make them sufficient for street railway traffic.

(2) That the Legislature of Georgia has, by reservation, an unrestricted right to revoke, alter or amend the Railway Company's charter or to destroy any franchise granted to it.

Relying upon these points, counsel dismiss (p. 21) as "inapplicable" many decisions of this court, which enforce the Contract Clause in Street Franchise Cases.

Before discussing these two points, we should perhaps notice some others mentioned in the brief though not treated as fundamental like the two above mentioned. We shall classify them as "Minor Propositions," in contradistinction to the "Major Propositions," above noted.

All italics in this brief are ours.

APPELLEES' MINOR PROPOSITIONS.

For convenience, we here state them with page references.

(1) The franchise to use the bridges originally granted to the Rome Street Railroad Company has expired (pp. 9-10).

(2) The Act of 1914 is valid and effective as a repeal of such franchise, because of limitations or reservations in some amendment to the original charter (pp. 10-13).

(3) The Act of 1914 is valid in exercise of police power (pp. 16-19).

(4) Construction of Act of 1914 contended for (p. 19).

(5) Effect of District Court's opinion (p. 20).

We shall take up these points in the order stated.

I.

It is Claimed that the Bridge Franchises Granted Originally to the Rome Street Railroad Company Have Expired and Therefore the County Authorities Could Order Appellee Off the Bridges.

No such claim has ever been made by anyone with reference to the *street* franchises, apart from the bridges.

In support of this claim, counsel cite the Georgia Code, Sec. 2215 (Ed. of 1911), which relates only to the *corporate life* of certain corporations and has nothing to do with the *duration* of street or bridge *franchises* granted to it. Misapplying this statute, they content themselves with alleging that the *bridge* franchises of the Rome Railway & Light Company have expired and that this case is similar to the Detroit case (229 U. S. 39) and the Cleveland case (204 U. S. 116) where certain street franchises were, in the grant, expressly limited to a term of years and the *full term* of such grant had expired.

Such a statement regarding the franchises of a public service corporation is like an imputation upon the chastity of a woman. The victim can not treat the statement in the same off-hand manner in which it is made but sometimes must assume the unjust burden of disproving the charge.

We emphatically deny every claim asserted by appellees under this head and we call attention to the following points:

(1) The Code Section relied upon deals merely with corporate life, that is, the "franchise to be." It does not deal with "franchises to have, to hold or to use" corporate property, tangible or intangible; real or personal.

It occurs in Article 5, Chapter 1, treating of corporate organization, whereas the franchises granted to various public utility companies such as railroads, street railroads, etc., to use the public highways in the discharge of their various functions are all dealt with in an entirely different Chapter of the Title pertaining to Corporations (Ga. Code of 1911, Sections 2585-2600, etc.).

In *Memphis R. R. Co.* v. *R. R. Com.*, 112 U. S. 609-*619*, this court said:

> "The franchise of being a corporation belongs to the corporators, while the power and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation."

A limit upon the life of a *charter* is simply a limit upon corporate life. This doctrine is thus succinctly stated in *Lord* v. *Equitable Life*, 194 N. Y. 212-*225:*

> "The *charter of a corporation* is the law which *gives it existence* as such. That is, its general franchise, which can be repealed at the will of the Legislature. A special franchise is the right, granted by the public, to use public property for a public use, but with private profit, such as the right to build and operate a railroad in the streets of a city. Such a franchise when acted upon, becomes property and can not be repealed, unless power to do so is reserved in the grant, although it may be condemned upon making compensation."

In Elliott on Railroad (Second Edition) Sec. 64, the point is thus stated:

> "A charter *contains* the grant of a franchise, *but is not the franchise itself.*"

It is now "the settled law of this court," that a limit upon corporate life does not affect the right of a corporation to acquire an estate (*e. g.*, a franchise) in fee or for a term extending beyond its corporate existence.

> Owensboro v. Cumberland Tel. Co., 230 U. S. 58-*71.*
> Minneapolis v. Minneapolis St. R'y Co., 215 U. S. 417-*430.*
> Detroit v. Detroit, etc., R'y Co., 184 U. S. 368-*395.*
> Detroit, etc., v. Detroit (C. C. A., 6th Cir.), 64 Fed. 628.

A franchise to occupy the streets or highways (including bridges) is so far distinct from a franchise to exist as a corporation that it may be created or granted *before* or *after* the corporation comes into being or *simultaneously* therewith. The duration of such franchise is in no way affected by the circumstance of when or how the corporation was created. Such a franchise may be granted to individuals and afterwards assigned by them to a corporation formed under laws then or thereafter passed.

> *Memphis, etc., R. R. Co.* v. *R. R. Commissioners*, 112 U. S. 609-*619.*

> "They are no part of the corporate life, if owned by a corporation, any more than they are a part of individual life, if owned by a human being."
>
> Lord v. Equitable Life, etc., 194 N. Y. 212.

(2) A franchise in the streets is property like any other right of way. It rests in grant, which may be in fee or for a term of years, as the law of the grant may determine.

The term of a legislative grant, like that of a private citizen, depends upon the law. At common law, a grant to one (either an individual or a corporation) without words of inheritance, was regarded as an estate for life but this rule has been changed by statute in nearly all the States, and especially in Georgia, where since 1821 the law has provided (Ga. Code of 1911, Sec. 3659) that

> "every conveyance, properly executed, shall be construed to convey the fee, unless a less estate is mentioned and limited in such conveyance."

Applying a like presumption under the law of Kentucky, this court held in *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S. 58-*71*, upon a review of former cases, that a franchise to use the streets of Owensboro granted, without words of limitation, to a corporation, which, by its *then* charter, would expire in twenty-five years was not limited to the life of the corporation but was a grant in perpetuity. Attention was called to the fact that the corporate life might be extended by amendment as is the case under the Georgia law.

Des Moines R'y Co. v. Des Moines, 151 Fed. 854-*861*.

In the Owensboro case, *supra,* this court said (p. 66):

> "If there be authority to make the grant and it contains no limitation or qualification as to duration, *the plainest principles of justice and right demand that it shall not be cut down,* in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the *public and permanent character* of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right can not be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights," quoting

Dillon on Municipal Corporations, 5th Ed., Sec. 1265.
People v. O'Brien, 111 N. Y. 1.

Exactly the same ruling was made in *Louisville* v. *Cumberland Tel. Co.,* 224 U. S. 649-*664,* where a grant was made without limitation as to time and the ruling was based upon the nature of the grant rather than the corporate life of the grantee, and this court quoted from the Detroit case, 64 Fed. 628, the following language:

> "Where the grant to a corporation of a franchise to construct and operate its road is not by its terms limited and revocable the grant is in fee."

By the common law as expounded by this court, franchises to occupy public highways are assignable (*Louisville* v. *Cumberland Tel. Co.,* 224 U. S. *661*).

The statutes of Georgia make them so (for example, see sections herein cited).

(3) The charter of the Rome Street Railroad Company has been twice amended so as to change its name and extend its corporate life, under its changed name, by the last amendment to 101 years from 1906.

The States generally allow purchasers of railroad or street railroad properties and franchises to become incorporated. Georgia has adopted two plans for accomplishing this result, namely,

(A) An entirely new incorporation as permitted by Chapter 114, Laws of 1894, p. 69, now Section 2600, Ga. Code of 1911.

(B) The substitution of the purchasers *or their successors or assigns* to the rights of the stockholders of the original or selling corporation, thus identifying such purchasers or their successors or assigns with the old corporation and investing them, *in the capacity of the old corporation,* with all its powers, privileges and franchises and with the additional right to reorganize or revitalize it and to obtain such *additional powers* and franchises by way *of amendment* as such purchasers or their *successors or assigns* may desire to obtain under the law.

This method is prescribed for railroads by Chapter 68, Laws of 1892, pp. 37-44, etc. (Appendix to this brief, pp. 1-3), and was amended so as to authorize the acquisition of *additional powers* by Chapter 106, Laws of 1894, p. 65 (Appendix to this brief, p. 4), and was extended so as to include street railroads by Chapter 114, Laws of 1894, p. 69 (Appendix to this brief, p. 4). The whole is substantially included, though not literally copied in Ga. Code of 1911, Sections 2585, 2586 and 2600.

Proceeding under the plan of *substitution* and *amendment*, last mentioned (and *not* by new incorporation, as assumed in the brief for appellees, p. 6), there have been two sales of the property and franchises of the Rome Street Railroad Company and two reorganizations of *that* company by persons who had succeeded to its properties, namely:

(A) A reorganization in 1894 by persons who were *in fact* substituted for the old stockholders and who continued the old corporation without material amendment except to change the name to City Electric Railway Co.

(See Amended Bill, Rec., p. 15 and Appendix to appellees' brief, pp. 18-20.)

(B) A reorganization in 1906 by persons who proceeded under the same statutes and were *in fact* substituted for the old stockholders and continued the old corporation with these material amendments permitted by the law.

(a) The name was changed to Rome Railway & Light Company.

(b) The capital stock was increased.

(c) The corporate life was fixed at 101 years from 1906.

It appears from the Amended Bill (Rec., pp. 15 and 16) that the foregoing proceedings were taken and this is confirmed by the official documents printed in the Appendix to appellees' brief, pp. 18-25.

We shall not burden the court with a superfluous argument to show that the foregoing amendments were made as provided by law and that they had the effect of extending to 101 years from 1906 the corporate life of the old Rome Street Railroad Company in its various names as changed.

Suffice it to say, that the Secretary of State, the only officer or tribunal or body by whom such charters or amended charters could then be granted under the Constitution and laws of Georgia, did grant the amendments as permitted by law.

The Act of 1892, Sec. 4 (Appendix, p. 2), now Sec. 2580, Ga. Code of 1911, makes his certificate *conclusive* evidence "of a compliance with all the requirements of this Act."

The Georgia Law (Sec. 2226, Appendix, p. 5) forbids any collateral attack upon the regularity of the proceedings taken. Even if it did not, this court would not question their regularity.

> *Minneapolis* v. *Minneapolis, etc., R'y Co.*, 215 U. S. 417.

Either of the two amendments is sufficient, without the other, the first to preserve the corporate organization of the original company for at least 30 years from 1894, and the second for 101 years from 1906.

(4) So the situation as to the original charter is this:

The duration of the corporate life of the Rome Street Railroad Company is wholly immaterial to a grant in fee of its franchises to use the public highways including these bridges. If it were material, certainly the State had a right to amend its charter and extend its corporate life. It could do this by direct Legislative Act or by delegating such authority for amendment to the Secretary of State, as indeed it was bound under the State Constitution to do, after having passed a general law on the subject of such corporations.

In allowing these amendments, the Secretary of State was exercising the sovereign power of the State of Georgia. His acts are not open to question.

(5) Even if appellant had been organized in 1906 as an entirely new corporation, under Section 2600, Georgia Code, as stated in appellee's brief, page 7, it would, under that section, have acquired a franchise for 101 years to use these bridges as parts of the streets or highways then occupied by its lines.

In such case the grant flowing directly from the statute would be protected by the contract clause.

Russell v. *Sebastian*, 223 U. S. 195.

(6) But it is not true, in any case, that appellant's franchises to cross these bridges have expired. On the contrary, they are continued in force as to these very bridges by the very Act of 1914 upon which appellees rely.

That Act provides in Section 4 that:

> "Any corporation *now* having a franchise shall have the right to use any new bridge upon complying with the *reasonable* terms and conditions imposed by the Board of Commissioners and the terms of this Act."

(See Appendix to our original brief, p. 16.)

This Act was approved August 15, 1914. It is conceded that appellant *then* had the right to cross the bridges. No conceivable limitation of thirty years had *then* intervened. In that situation, the Legislature expressly declared that appellant *should have* the right to go on the new bridges and the only limitation it sought to impose was compliance "with the *reasonable* terms and conditions imposed by the Board," etc.

The Amended Bill (Rec., pp. 20 and 21) shows that the conditions imposed are "wholly unreasonable." The motion to dismiss confesses this charge and the statement of the case sustains it in every particular. Therefore, under the Act of 1914, the appellant has the express right to cross the bridges—at all events until such time as the appellees may prescribe some "reasonable" condition, within the scope of their authority, and appellant shall refuse to comply therewith.

Clearly, we submit, the bridge franchises of appellant have not expired.

II.

It is Claimed that the Act of 1914 is Valid and Effective as a Repeal of Appellant's Franchise Because of Limitations or Reservations in Some Amendment to the Original Charter.

The only amendment here relied on is that of November 12, 1889 (Appendix to original brief, p. 12).

This point is briefly answered by the decision in *Floyd County* v. *Rome Street Railroad Company*, 77 Ga. 614, cited in our original brief on pages 17, 18 and 20.

That case arose in 1887. It held that the Rome Street Railroad Company under its *original* charter had acquired the right to cross these bridges as a part of the streets or highways of the city of Rome, and that it was unnecessary to look to any amendments of the charter for such rights. It was endorsed in principle by the same court in *City Electric Railway Company* v. *Floyd County*, 115 Ga. 655, decided after the Amendment of 1889.

Moreover, the Amendment of 1889 does not attempt to *limit* in any way the grant *theretofore* made by the Legislature itself in the original charter. It simply *denies* to the County Authorities the right to grant anything more than a temporary and revocable permit to use the bridges.

The appellant has *never* claimed under a grant from the County Authorities. Hence, the Amendment of 1889 has no application whatever.

There is no other reservation in the charter itself or in any *legislative* amendment thereof.

Other reservations claimed under statutes authorizing the Secretary of State to grant charters or amendments are more properly dealt with under another heading.

III.

It is Claimed that the Act of 1914 is Valid as an Exercise of the Police Power.

We have discussed this point in our original brief (pp. 47 to 58).

We deny that the Act is an exercise of the police power, *in so far as it is claimed to revoke appellants' franchises to use the bridges.* Certainly the exercise of that power by appellees is not *bona fide,* because they offer to let appellant use the bridges if it will pay them what they demand.

Even if the Legislature had the power to enact a law requiring appellant to participate in the expense of these bridges or to pay an annual charge for their use, it would not be allowable to delegate to appellees *the power to fix such payment.* To do that would make them judges in their own case.

Nothing could show the injustice of such a proceeding more clearly than this case where appellees contend that appellant can not acquire more than a mere revocable license to use the bridges and yet exact one-third the cost as a condition of such use.

This is so "palpably wrong" as to call for the intervention of judicial power.

Bienville Water Co. v. Mobile, 186 U. S. 221.
Macon R. R. Co. v. Gibson, 85 Ga. 1.

As incidental to their discussion of the police power, counsel claim that appellees are under no obligation to erect or maintain any of these bridges or to make them sufficient to accommodate the cars of appellant. This proposition is carried forward as one of appellees' major propositions and we shall discuss it under that head.

IV.

Construction of the Act of 1914 Contended for by Appellees.

We have gone into this subject quite fully at pages 64 to 70 of our original brief. We submit the appellees are clearly wrong in their construction of the Act. Judge Newman expressed doubts on the subject (Rec., 34).

V.

Effect of District Court's Opinion.

Counsel for appellees make these points upon the opinion of the district judge.

(1) The Act is the exercise of the police power to the extent that it provides for tearing down the old bridges and erecting new ones, looking to the public safety.

Granting this, it does not follow that other portions of the Act which deal with franchises to cross the bridges can be referred to the police power.

(2) It is stated, that the rights to use the bridges were destroyed when the old bridges were torn down. This we deny. The Supreme Court of Georgia held exactly the reverse in *Floyd County* v. *Rome St. R. R. Co.*, 77 Ga. 614, already cited.

(3) It is argued that, by dismissing our bill, the District Court found there is nothing unreasonable or unjust in exacting from appellant one-third the cost of the bridges. Surely any such "finding" could not bind this court when the amended bill alleges that the conditions exacted were "wholly unreasonable," and this is confessed by the motion to dismiss.

(4) It is argued, that the District Court held that appellant had no vested interest such as would give it any right to object to the Act of 1914. The cases cited by us sustain the contrary doctrine.

(5) It is said, the court differentiates the instant case from *Floyd County* v. *Rome St. R. R. Co.*, 77 Ga. 614, in view of the Act of 1914. We have elsewhere discussed the nature and effect of that Act and the power of the Legislature to pass it, if it means what appellees contend. We can add nothing on that score.

APPELLEES' MAJOR PROPOSITIONS.

This brings us to the two points ultimately relied on by counsel for appellees, namely:

1. That the County Authorities are under no obligation to construct bridges at all, or to make them sufficient for street railway traffic.

2. That under a reserved right to revoke, alter or amend appellant's charter, the Legislature had power to revoke its right to cross the bridges in question and that it actually did so by the Act of 1914.

We prefer to discuss these questions in reverse order.

I.

It is Claimed that a Right to Repeal, Alter or Amend the Bridge Franchises of Appellant is Reserved by the Constitution and Statutes of Georgia.

In support of this claim, counsel for appellees cite certain provisions of the Georgia Constitution and laws, to which they give a construction and effect not permitted by other sections of the Georgia Constitution or by the Contract Clause of the Federal Constitution.

Situation involved.

Consider the situation of the parties. Under a grant from the State, appellant has extended its lines over these three bridges for distances ranging from one to five miles.

It has developed the territory beyond the bridges, and under its franchises, it is bound to serve that territory.

If the appellees' claims be sustained, then the State has assumed the position of not merely cutting the street railway lines into four parts, but of insisting that the public be served, and *adequately served,* by each of the *dismembered parts,* and that too without the privilege of crossing the bridges with cars *or with cables* for the purpose of supplying such parts with motive power or equipment.

This is in effect a requirement that appellant organize its system into four distinct units for power and service, or submit to the exactions made by appellees. *Such* *action is not a mere revocation of a right to cross the bridges. It is a destruction of all appellant's property lying beyond the bridges.*

Analysis of Georgia Constitution and Laws and their application to situation involved.

(1) The various sections of the Constitution must be read in pari materia.

Some of these sections have been stressed by counsel for appellees. Others, equally important, have been glossed over.

The Constitution not only forbids "irrevocable grants of special privileges and immunities," but it also forbids the passage of "any law impairing the obligation of contracts," and also limits the power of revocation by forbidding its exercise "except in such manner as to work no injustice to the corporators or creditors of the incorporation." (Appellees' brief, App. p. 1.)

Construed together, these sections clearly forbid the Legislature to revoke franchises, where to do so would *either work injustice* to corporators or creditors *or* impair the obligation of a contract.

This construction *in pari materia* was applied by the Circuit Court of Appeals for the Eighth Circuit *so as to limit a power of repeal reserved* in the Constitution itself, (*Omaha Water Co.* v. *Omaha,* 147 Fed. 1-7) and this court in effect upheld such application, by dismissing an appeal and denying a *certiorari* to review the judgment.

Omaha v. *Omaha Water Co.,* 207 U. S. 584.

(2) Legislative acts, however broad, must yield to limitations imposed by the State or Federal Constitution.

The cited sections of the Constitution must be read into every legislative act dealing with the revocation of franchises whether passed *before* the Constitution as Section 2159, Ga. Code of 1911 or *since,* as those general laws relating to the organization of companies having street franchises.

FEDERAL COURT DECISIONS.

This court has twice considered provisions of State constitutions (Alabama and Mississippi) substantially similar to that of Georgia, and has held the legislative power of repeal to be limited thereby.

Bienville Water Supply Co. v. *Mobile,* 186 U. S. 212-223.

The Alabama Constitution, like that of Georgia, forbade irrevocable grants and also forbade the passage of a law impairing the obligation of contracts and also contained an express provision allowing the Legislature to revoke, alter or amend charters,

> "whenever, in their opinion, it may be injurious to the citizens of the State, *in such manner, however, that no injustice shall be done to the corporators.*"

The case turned upon the exclusive features of the franchise claimed, but this court also considered the clause quoted, as limiting the right of repeal to cases where "no injustice shall be done to the corporators." In that connection, it was said (p. 221), that the section, though a new one to this court, was found in the Constitution of more than one State, and according to the construction given by some State courts, the section preserved *for judicial inquiry,* in each case, the question of the justice of the repealing Act so far as corporators are concerned.

This court inclined to regard such a provision of the State Constitution as merely declaratory of the law, adding (p. 222):

> "For courts have often held that it was beyond the power of the Legislature, under the guise of an Act amending or repealing a charter, to take away the property of the corporation."

Vicksburg v. *Vicksburg Water Co.,* 202 U. S. 453.

A similar provision in the Mississippi Constitution of 1890 was cited by the court in this case as limiting the power of alteration, amendment or repeal, reserved in that Constitution, to those cases, where the public interests require the repeal, and where "no injustice would be done the stockholders." This court said in the Vicksburg case (p. 465) that if the Water Works Company had a binding contract excluding competition by the city, "we think it would be a *palpable injustice* to the stockholders to permit the competition of the city by new works of its own."

Mercantile Trust Company v. *Columbus,* 161 Fed. 135.

The Vicksburg case, *supra,* was cited and applied in a Georgia case, involving the *same sections* of the Georgia Constitution under consideration here, by the *same judge,* who decided this case in the court below. The court cited and compared the provisions of the Georgia Constitution and the Mississippi Constitution and *found them identical in legal effect,* excepting that the power of repeal was expressly contained in the Mississippi Constitution. Following the Vicksburg case, Judge Newman held that the *exclusive* feature of the Water Company's franchise could not be repealed or annulled, by establishing a municipal plant.

STATE COURT DECISIONS.

The State courts are in accord on this proposition.

Appeal of Williamsport Pass. R'y Co., 120 Pa. St. 1, 13 Atl. 496.

In this case, a street railway company obtained a charter authorizing it to lay tracks upon the streets of Williamsport, without the consent of the local authorities. The *then* Constitution provided that the Legislature should have power to alter, revoke or annul any charter "whenever in their opinion it may be injurious to the citizens of this Commonwealth; *in such manner,* *however, that no injustice shall be done to the corporators.*"

After the Street Railway Company had expended a great deal of money under its franchise grant, and while it was proceeding to lay additional lines in the streets, the city authorities stopped the work, claiming that by an Act of the Legislature, subsequent to the granting of the street railway company's charter, that charter *had been amended so as to require consent* of the city authorities to the extension of the railway lines. The Supreme Court decided against the contention of the city, holding that, under the section of the Constitution cited above, two things must occur *before the power of revocation or amendment could be exercised,* namely:

(a) The charter must in fact be injurious to the citizens, and

(b) There must be no injustice done to the corporators.

Neither of these conditions existed in the Pennsylvania case, and neither of them exists in this case.

GENERAL PRINCIPLES OF CONSTITUTIONAL LAW.

Aside from such special provisions of the State constitutions, it is well settled by this court, that injustice, like that threatened in this case, can not be perpetrated under the guise of amendment, alteration or repeal, even though such power be expressly reserved without express limit thereon.

In the *Sinking Fund cases,* 99 U. S. 700-720, 721-741, this court, considering such power of Congress, expressly reserved in the charters of the railroad companies, said (p. 720):

> "That this power has a limit, no one can doubt. All agree that it can not be used to take away property already acquired under the operation of the charter."

On p. 721 it quotes with approval from *Shields* v. *Ohio,* 95 U. S. 324, the following language:

> "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and *be consistent with the scope and object* of the act of incorporation. Sheer oppression and wrong can not be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations, in such cases, are surrounded by the same sanctions and are as inviolable as in other cases."

In his opinion, Justice Strong, referring to the reserved power of amendment or repeal, said (p. 741):

> "All the cases agree that such a reserved power is not without limits. I think its limits may be stated generally thus: *It* must be exercised, when exerted at all, *so as to do no injustice to those to whom the franchise has been granted.* Certainly the reservation *can not mean a right to take away the franchise,* in whole or in part, *and yet hold the grantee* to the performance of the duties assumed—the consideration given for the grant."

This language applies exactly to the instant case where the so-called repeal of bridge franchises disables the appellant from serving the public beyond the bridges, though leaving it under obligation to do so.

The same doctrine has been declared many times by this court.

Lake Shore, etc., R'y Co. v. Smith, 173 U. S. 698.
Stanislaus County v. San Joaquin, etc., Co., 192 U. S. 201.
Fairhaven R. R. Co. v. New Haven, 203 U. S. 388-389.

Detroit v. *Detroit, etc., Road Co.*, 43 Mich. 140.

This was a proceeding to compel a turnpike company to remove a toll gate beyond the city limits of Detroit. The company had been chartered to build and maintain a road from Detroit to Howell. There was *an express reservation in the charter* of a right to alter, amend or repeal the charter after thirty years. After that time had expired, the Legislature passed the Act in question in attempted exercise of its reserved power. The Act deprived the company of toll on about two miles and a half of its road, which had been taken into the city limits of Detroit. Its validity was challenged and the court held it void, notwithstanding the reserved right to repeal or amend.

The opinion by Judge Cooley reviews the authorities and announces its conclusions (p. 147) as follows:

> "But there is *no well considered case* in which it has been held that the Legislature under its power to amend a charter, might take from the corporation any of its substantial property or property rights. (Citing authorities.) * * *
>
> "But for the provision in the Constitution of the United States, which forbids the impairing of the

obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved.

"The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess.

"It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, *but it could not do* what would be *inconsistent* with constitutional principles.

"And it can not be necessary at this date to enter upon a discussion in denial of the rights of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, which has been forbidden in England ever since Magna Charta, and in this country always.

"It is immaterial in what way the property was lawfully acquired; by gift or descent, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the law of the land.

* * * * * * * * *

"What the State claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also, or from any township on the line, and a single section of a statute may annihilate the property of respondent altogether.

"A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation but of spoliation."

Judge Cooley's opinion in the above case has been repeatedly cited by this court and many other courts of last resort. Its soundness has never been impeached.

Macon R. R. Co. v. *Gibson,* 85 Ga. 1.

In this case the *Georgia Court cited at great length* the opinion of Judge Cooley, *supra,* using the following language:

> "Where an attempt is made to deprive the corporation of its property by amending its charter, doubtless the observations of Cooley, J., in Detroit v. Detroit, etc., Co., 43 Mich., *supra,* ought to be recognized as sound."

The court, however, showed by a careful analysis of the facts before it that there was no injustice in the amendment there questioned. Its decision can be upheld because the railroad company had not actually built its line, and *was indemnified against any increased expense* by reason of the change of route proposed.

Manifestly there was a town site scheme behind the whole question of railroad location and the court must have known it.

People v. *O'Brien,* 111 N. Y. 1-66.

This case involves the validity of certain franchises granted to the Broadway Surface Railway Co. by New York City. Prior to December 5, 1884, the railway company had become incorporated under general laws and had acquired a franchise from the city. It had built a part of its line when in May, 1886, it was dissolved by an Act of the Legislature. Suit was thereafter brought by the Attorney General to enforce the provisions of this Act, which was attacked as invalid. Two questions were involved, namely: (a) *the duration of the street franchise,* and (b) *the power of the Legislature to destroy such street franchise.*

It was held that the Legislature had power *to destroy the life* of the corporation, but the court, in a masterly opinion, held that the street franchises were granted in perpetuity *though the life of the corporation was limited,* and that the Legislature had *no power to destroy them,* notwithstanding the power of alteration, amendment or repeal reserved by the Constitution of 1846 and by the Act of 1850.

In this connection the court said, with reference to the repealing statutes:

> "The statutes contemplate *the absolute destruction of the property* of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of mortgages upon such property; and this action is avowedly prosecuted to accomplish the purposes of the legislation.
>
> * * * * * * * * *
>
> "If it could be supposed for a moment that this claim was reasonably supported by authority, or maintainable in logic or reason, *it would give grave cause for alarm* to all holders of corporate securities. The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive Legislatures, to sanction or destroy at their pleasure or discretion, is a proposition *so repugnant to reason and justice,* as well as the traditions of the Anglo-Saxon race, in respect to the se-

> curity of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary; and we desire in unqualified terms to express our disapprobation of such a doctrine.
>
> "Whatever might have been the intention of the Legislature, or even of the framers of our Constitution, in respect to the effect of the power of repeal reserved in acts of incorporation upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution. Considering the power which the State has to terminate the life of corporations organized under its laws, and the authority which its Attorney General has by suit to forfeit its franchises for misuse or abuse, and to regulate and restrain corporations in the exercise of their corporate powers, there is little danger to be apprehended from the overgrowth of power or the monopolistic tendencies of such organizations; but, whatever that danger may be, it is *trivial in comparison* with the widespread loss and destruction which would follow a judicial determination that the property invested in corporate securities was beyond the pale of the protection afforded by the fundamental law.
>
> * * * * * * * * *
>
> "But we think that there are *no reported cases* in which the judgment of the court has ever taken either the franchises or property of a corporation from its stockholders and creditors, through the *exercise of the reserved power* of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation."

The New York Court expressly approved Judge Cooley's opinion in the Detroit case, *supra.*

People v. *O'Brien* has been expressly approved by this court.

Detroit v. Detroit, etc., Co., 184 U. S. 395.
Owensboro v. Cumberland Tel. Co., 230 U. S. 66.

The authorities above cited clearly show that the State of Georgia has no power to do what appellees *claim* it has attempted to do in this case.

CASES DISTINGUISHED.

Counsel for appellees rely upon certain cases in which it was held that a reserved right of repeal or amendment was *there* properly exercised.

Of course, there have been such cases, ever since the Dartmouth College case. Those cited by us show the grounds for distinction.

The decisions involving claims of *exemption* from *taxation* or *regulation* are typical cases sustaining the reserved power of repeal. This court has distinguished such claims from those "positive rights or privileges" such as "the franchise to run cars, etc.," saying that "immunity from taxation" is not such a privilege that the franchise can not be exercised without it but is purely "personal."

Morgan v. Louisiana, 93 U. S. 217-223.

We need notice only two cases referred to by appellees.

Greenwood v. *Freight Company,* 105 U. S. 13.

In this case, the Marginal Company was chartered by special Act and authorized to build a railroad in the streets of Boston. By general laws then in force the power of repeal was reserved by the Legislature. The charter was repealed and the corporate life of the Marginal Company terminated thereby and the Union Company chartered to take over its property.

This court held the repealing Act *valid* as a termination of corporate existence, *but invalid,* insofar as it attempted to turn over *any property* of the Marginal Company to the Union Company.

As to the street "franchises" of the Marginal Company, the case can not be rightly understood without reference to the settled principles of Massachusetts law, under which a "franchise" to use the public streets is a mere "license" revocable at will. It is not an interest in real estate nor even an easement in the streets, and not taxable as such.

> Henderson v. Central Pass. R'y Co., 21 Fed. 365.
> Conn. Valley R'y Co. v. Northampton, 213 Mass. 54.
> Lorain Steel Co. v. Norfolk, etc., R'y Co., 187 Mass. 500.
> Cook on Corporations (Ed. 1913), Sec. 913.

Hamilton Gas Co. v. *Hamilton,* 146 U. S. 258.

Here was no attempt to put the Gas Company out of the streets. The city merely declined to buy gas from it and proceeded to erect a gas plant of its own, as the court held it had the right to do.

The court doubted the exclusive character of the franchise claimed by the Gas Company because of the special provisions of the Ohio Constitution, but held that, even if there had been an exclusive right, the power was expressly given to repeal the *exclusive* feature, leaving the Gas

Company in the streets to supply such customers as it might have.

We submit that the cases cited by counsel for appellees are clearly distinguished from the instant case, which is controlled by the cases we have heretofore cited.

II.

Appellees Contend that They Are Under No Obligation to Construct the Bridges at all or to Make Them Sufficient for Street Railway Traffic.

(1) As to their obligation to construct and maintain these bridges.

The State is bound to provide highways for its citizens. Bridges are universally held to be parts of the highway.

> Floyd County v. Rome Street R. R. Co., 77 Ga. 614.
> Washer v. Bullitt County, 110 U. S. 558-*564*.
> Westfield Borough v. Tioga Co., 150 Pa. St. 152.

The State, assuming this obligation, may discharge it through agencies designated by it.

The State of Georgia has devolved upon appellees governmental control over roads and bridges in Floyd County and has authorized them to issue bonds and to levy a tax for the purpose of building and maintaining such bridges. (See Georgia Laws cited in our original brief, Appendix, pp. 1-2, and especially the Act of 1914, there cited, pp. 13-18.)

Where such *powers* are conferred, corresponding *duties* are imposed. The courts hold that officials, having the power to levy a tax and to build or repair a bridge, may be indicted for failure to do so, where a new bridge, or the repair of the old one, is demanded by public necessity.

State v. Street, 117 Ala. 203.
Erie County v. Commonwealth, 127 Pa. St. 206.

So much for appellees' obligation to construct the bridges.

(2) As to appellees' obligation to make the bridges sufficient for street railway traffic.

The Act of 1914, Section 3, authorizes appellees to construct bridges *"of sufficient width to meet the demands of public travel."* Public travel includes travel by street cars of a company authorized to use the bridges.

The law contemplates but one bridge at each place and that is part of the highway. It is held by the Georgia courts, in litigation over one of these bridges, that appellant, having a right to use the highway, ***necessarily*** has the right to use the bridge, which is part of the highway. (***Floyd County*** v. ***Rome Street R. R. Co.,*** 77 Ga. 614.)

Counsel (in their brief, p. 18) say that appellees might discharge their duty by building a bridge that would be "safe" for the "general public" using the "ordinary means of transportation," but "entirely unsafe" for the public in street cars, which are the "ordinary means of transportation" for the "general public."

We challenge this statement on the authority of ***Chicago*** v. ***Robbins,*** 2 Black (U. S.) 418. The county board that would attempt such a course would be promptly indicted for neglect of duty (*State* v. *Street,* 117 Ala. 203), or possibly for homicide in case of death caused by such neglect of duty.

If appellees are bound to build the bridges, and appellant has the right to use them, can it be doubted that they must build bridges sufficient for street railway traffic? The hardship of this is not apparent in this day, when trucks and vans of greater width and tonnage than street cars are in constant use on city streets and county roads and bridges.

It follows, that appellees can not deny appellant access to these bridges. They can only regulate its use of them by prescribing "reasonable" conditions in the interest of public safety. They can not destroy or deny its right to use them.

Even a *private* corporation, owning a toll bridge, can not exclude a street railway company from the use of such bridge when once it has been made a highway for street railway traffic.

> *Covington, etc., Bridge Co.* v. *South Covington, etc., R'y Co.,* 93 Ky. 136.

(3) As to the increased expense, if any, of building or maintaining the bridges so as to accommodate street railway traffic.

This leads us to consider appellees' claim that, under the police power, they are entitled to make a charge against appellant for its use of the bridges.

In answer to this claim, it will be observed that there has been *no attempt in this case* to ascertain such increased expense or to use same as a basis of the exactions demanded of appellant. There has been *no hearing* of any kind before any *impartial* tribunal or *even before appellees themselves,* for the purpose of ascertaining these vitally important facts.

Whether a street railway company should be made or can be made to contribute to the expense of building or maintaining a bridge as part of a public highway traversed by its lines under franchise rights already owned by it, depends—

> Partly upon such franchise and—
>
> Partly upon the general law of the State with reference to bridges and highways.

But in any conceivable case its contribution must be limited to or measured by the increase, if any, in cost or upkeep due to the street railway company's use in excess of the use by the general public. Also it must be borne in mind that use by the street railway is use by the general public.

To charge a lump sum of $75,000.00 when appellees at the same time claim that appellant's franchise may be revoked at any time is so unjust as to shock the conscience. Appellees can not consistently claim anything beyond an annual charge while the bridges are in use.

As to franchise rights.

An instructive case on the franchise right of a railroad company to use a public bridge is found in *Des Moines* v. *Chicago, etc., R. R. Co.,* 41 Iowa, 569.

The city of Des Moines, under legislative authority, had erected a bridge within its limits, under an ordinance providing for the collection of certain fixed tolls, until the bridge should be paid for, after which it should be free to the public.

Thereafter, under like legislative authority, it granted to the railroad company a right to maintain and operate a track over one of these bridges, subject to certain police regulations as to the construction and maintenance of the track, gates, etc., but without any provision, either in that or in the original ordinance establishing the bridge, for charging tolls.

Four years later the city passed an ordinance prescribing certain tolls for the passage of engines and cars over the bridge. The railroad company declined to pay these tolls and the city brought suit to recover them.

The railroad company defended on the ground that it had a franchise to cross the bridge, *subject only to the police regulations therein required.* The trial court denied the city's right to collect tolls and the Supreme Court of Iowa affirmed the judgment, holding that the right of way originally granted to the railroad company was *subject only to the police regulations therein specified.* It said (p. 573):

> "The railroad company to whom the grant was made, or its assignee, having expended its money in order to comply with the regulations and conditions of the ordinance granting the right, was entitled to enjoy the privilege granted, without being subject to any further obligations or burdens."

The city could not engraft a new condition upon its original grant without consent of the railroad company. (Citing *State, etc.,* v. *Herod,* 29 Iowa, 123; *New York, etc.,* v. *Second Avenue Co.,* 32 N. Y. 261.)

The court held that the city had power to grant the right of way to the railroad company upon the conditions originally stated and that the increase in its business, and corresponding increase in its use of the bridge, did not entitle the city to impose a charge of tolls, not provided for in the original grant.

As to the general law of Georgia.

In some eastern States (*e. g.,* Maine, Massachusetts, New Jersey, Connecticut and Pennsylvania) there is legislation, providing for an equitable ascertainment, by an *impartial* tribunal, of the increased expense, if any, in building a new bridge or in maintaining an old one, due to its exceptional use by a street railway company, and apportioning such increased expense, *thus impartially ascertained,* against the street railway company.

In the West, as shown by the Iowa case, *supra,* and in the South, as shown by the Georgia law, we find no such legislation. In its absence there can be no legitimate exercise of the power claimed by appellees.

In no case, that we find, has any statute been passed, or upheld, which undertakes to give to a county board, building or maintaining a bridge, the right to *arbitrarily* fix, *by and for itself,* the amount to be *paid to itself,* by a street railway company (*already owning its franchise* to use the bridge as a part of the public highway) as a contribution to the expense of construction or maintenance.

As already stated (*ante,* p. 14), this would make such board *a judge between itself and the street railway company,* in the exercise by the street railway company *of rights not derived from the Board.*

We may add that, in our opinion, the Georgia Legislature has not attempted, in this case, to give the appellees any such arbitrary power as they have assumed to exercise. Nor has it authorized them to require of appellant anything in the way of a contribution to the expense of these bridges.

CONCLUSION.

If we could conceive of any charge against appellant being sustained by the courts, we know it must meet these requirements, namely:—

Any charge under the police power must be *reasonable* and based upon conditions, disclosed to the court, so that it can judge of such reasonableness.

Any charge under the taxing power must be based upon assessment, which involves hearing, and must not be confiscatory or offend the Due Process Clause or the Equal Protection Clause.

Any charge under the Georgia Constitution must "work no injustice to corporators or creditors."

Appellees' claims do not meet any of these requirements. We therefore ask a reversal of the judgment, with directions to grant the relief prayed.

Respectfully submitted,

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APPENDIX TO REPLY BRIEF.

(Containing additional Georgia Laws cited.)

I.

General act for incorporation of railroads, etc. (Approved December 17, 1892.)

Chapter 68, Laws of 1892, pages 37 to 52:

Section 1, provides—

> "That from and after passage of this Act, all corporate powers and privileges to railroad companies in this State shall be issued and granted by the Secretary of State, upon the terms, liabilities, restrictions and subject to all the provisions of this Act and the Constitution of this State."

Section 2, specifies the requirements in petition for incorporation.

Section 3, provides form of certificate to be issued by Secretary of State in granting charter, and where such certificate is issued, provides,

> "Thereupon, persons who signed said petition and all persons who shall become stockholders in such company shall be a corporation by the name specified in said petition and certificate, and shall possess the powers and privileges and be subject to the provisions contained in this Act."

Section 4, requires the Secretary of State to satisfy himself that the requirements of law have been substantially complied with, and provides that his certificate,

> "shall be conclusive evidence of the existence of such corporation in all the courts and places in this State and of a compliance with all the requirements of this Act."

Section 8, provides:

> "The rights, powers and privileges granted said corporation shall not continue for a longer period than one hundred and one (101) years, unless the same been continued by the laws of force at the expiration of said one hundred and one years." (Now Section 2584, Ga. Code, Edition of 1911.)

Section 9, Subsection 10, provides for the substitution of purchasers of railroad properties and franchises in place of the original stockholders and confers upon them the power of amendment and reorganization so as to revitalize the old corporation.

> "In case of sale of any railroad heretofore incorporated by virtue of any general or special law or which may hereafter be incorporated by virtue of this Act, or any part thereof constructed or in course of construction, or by virtue of any trust deed, or any foreclosure of any mortgage thereon, or any judicial sale, the party or parties acquiring titles under such sales, and their associates, *successors or assigns,* shall have or acquire thereby, and shall exercise and enjoy thereafter the same rights, privileges, grants, franchises, immunities and advantages in or by said trust deed enumerated and conveyed, which belonged to and were enjoyed by the company making such deed or mortgage, or contracting such debt, so far as the same relate or appertain to that portion of said road or the part or line thereof mentioned or described and conveyed by said mortgage or trust deed and no further, as fully and absolutely in all respects, as said railroad company, officeholders,

> shareholders and agents of such company might or could have had had not such sale or purchase taken place. Such purchaser or purchasers, their associates, *successors or assigns,* may proceed to organize anew by filing a petition to the Secretary of State, with a request therein to be substituted for the original petitioners and stockholders, with all their powers, rights, privileges and duties and liabilities under this Act, when said new incorporators may proceed anew by electing new directors as provided by this Act, and may distribute and dispose of stocks, and may conduct their business generally as provided by this Act; and such purchaser or purchasers and their associates shall thereupon be a corporation, with all the powers, privileges and franchises conferred by, and be subject to the provisions of this section."

Section 16, excepts suburban and street railroad companies from operation of the law.

Section 17, provides that any railroad company theretofore incorporated,

> "may amend its charter either by adopting the provisions of this act or by extending the time of expiration of its original charter for a period of fifty years, and when it so amends its charter it may retain its original organization and the same amount of capital stock provided for in its original charter and any other powers and privileges, except exemption from taxation, granted in its original charter, which may not be in conflict with this act," etc.

This Section also prescribes the mode of amendment by petition to the Secretary of State.

II.

Amendment to Act of 1892, in regard to incorporation by purchasers of railroads. (Approved December 15, 1894.) Chap. 106, Laws 1894, p. 65.

This Act amends *Section 9* of the Act of 1892, ***supra,*** by providing for an amendment so as to give to the purchasers additional powers. It provides as follows:

> "If the purchasers desire any additional powers not contained in the original charter of the railroad company, but which may be obtained under the law of which this is amendatory, the said petition shall set forth specifically what additional powers are so desired."

III.

Street railroads, how incorporated. (Approved, December 18, 1894.) Chap. 114, Laws 1894, p. 69.

This Act expressly repeals *Section 16* of the *Law of 1892,* relating to incorporation of railroads, which Section excepted street railroads therefrom, and in lieu thereof provides that Act of 1892 in all of its provisions

> "shall apply to and govern in the incorporation, control and amendment of suburban and street railroad companies insofar as the same are applicable and appropriate thereto."

IV.

Georgia Code, Edition of 1911.

Section 2226,

> "The existence of a corporation, claiming a charter under color of law, can not be collaterally attacked. All who have dealt with a corporation as such are estopped from denying its corporate existence."

Section 2241,

> "Every corporation is dissolved—
> 1. By expiration of its charter.
> 2. By forfeiture of its charter.
> 3. By a surrender of its franchises.
> 4. By the death of all its members without provisions for a succession."

Section 2245,

> "Upon the dissolution of a corporation, for any cause, all of the property and *assets of every description* belonging to the corporation shall constitute a fund—first, for the payment of its debts, and then for equal distribution among its members."

Section 2926,

> "Whenever any private corporation, created under any general or special law of this State, shall become insolvent, and its assets be the subject of administration by the court, the franchises possessed and enjoyed by such corporation in virtue of its charter or order of incorporation shall be considered assets, and the same may be sold, under order of the court, through a receiver or otherwise."

Section 2927,

"The purchaser or purchasers of such franchises, their associates, successors, and assigns, shall, upon complying with the requirements of this section, have and acquire and may thereafter exercise and enjoy the same rights, privileges, immunities, and advantages conferred in the charter or order of incorporation of such insolvent corporation, as fully and absolutely, in all respects, as the former company might or could have had and enjoyed the same had no such sale and purchase taken place: Provided, that nothing in this section shall be construed to reserve to such purchaser or purchasers any exemption from State, county, or municipal taxation, or any special rights, privileges, or immunities inconsistent with the Constitution of this State."

Section 2928,

"Such purchasers, their associates, and assigns may organize anew in the manner prescribed by law."

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Supreme Court of the United States

OCTOBER TERM, 1916.

No. 547,

Rome Railway & Light Company, Appellant.

VERSUS

Floyd County, Georgia, et al., Appellees.

May it please the Court:

We beg leave to submit the within argument and brief in behalf of the appellees in the above stated cause.

We have included in the Appendix hereto, such of the Georgia Laws as we deem material in the consideration of the case, together with copies of the charters of the City Electric Railway Company and of Rome Railway & Light Company.

STATEMENT OF CASE

The City of Rome, within the corporate limits of which the three bridges referred to in this cause have been and are being constructed, is located at the confluence of the Etowah and Oostanaula rivers, forming the Coosa river, and the city is cut into several parts by these rivers. To connect up these several parts of the city, bridges were constructed across the Etowah river where the same intersects Second Avenue and Broad Street, and across the Oostanaula river, where the same intersects Fifth Avenue.

Prior to 1881, these were toll bridges, owned by private parties. In 1881, the General Assembly of Georgia passed an Act authorizing the authorities of the County of Floyd to issue bonds and purchase these bridges.

Acts of 1880 and 1881, pages 540-541.

(See Appendix, page 5.)

In accordance with that Act, the bridges were purchased by the County of Floyd.

The original charter of the Railway Company was granted by an Act of the General Assembly of Georgia, approved December 12th, 1884, (Appendix, pages 6-7), and gave it the power to construct a street railroad along certain streets, within the City of Rome; these streets being located between the Etowah and Oostanaula rivers.

On October 4th, 1884, the Board of Commissioners of Roads and Revenues of the County passed a resolution, to the effect that it

"Will not object to the City of Rome granting the right to the Street Railroad Company to cross the Howard Street (now Second Avenue) bridge, providing no obstruction to public travel arises therefrom, and also that the franchise be limited as to time." (See amendment to original bill, record, page 17.)

This charter was amended by the Act of the General Assembly, approved October 7th, 1885, (Appendix, page 8), authorizing the extension of the Company's lines through and along the streets of four other towns lying adjacent to the City of Rome, and which have since become a part of the city, by reason of the extension of the corporate limits.

In 1885, the bridge at Second Avenue was washed away, and when the same was reconstructed, the County of Floyd filed a bill to enjoin the Railway Company from using the new bridge, and that question was passed on by the Supreme Court of Georgia in the case of Floyd County vs. Rome Street Railway Company, 77th Ga., 614, wherein it was decided that the County authorities did not have the right to prevent the Railway Company from using the bridges, holding

> "Where the consent of the County authorities to the use of the bridge had been given, and

> the condition on which it was accorded, was accepted and acted on by the Company, it became a binding contract, **until the license was revoked by the only authority having power to revoke it.**"

This necessarily implies that the General Assembly of Georgia, which granted the right to cross the bridges, could revoke it, and it will be noted that this decision was rendered before the passage of the Acts approved September 21st, 1887, and November 12th, 1889, amending the charter of the Company, and hereinafter referred to.

This charter was again amended by the Act of the General Assembly, approved September 21st, 1887, (Appendix, page 9), which authorized the Company to use dummy engines as motive power. This amendment provides in Section One thereof, that the Company's motors

"May pass over the bridges in said city, subject, however, to such regulations for the safety and convenience of the traveling public and safety and preservation of the bridges, as may be prescribed from time to time by the Board of Commissioners of Roads and Revenues of Floyd County, the rate of speed not to exceed four miles an hour. No weight or load shall be carried on or over any of said bridges by said Company, that will subject the same to a greater stress than that shown to be safe by the strain sheets of said bridges, and the tracks laid thereon shall be so arranged and kept by said Company in such condition as not to interfere with free travel thereon for vehicles; provided, however, that whenever a majority of the Board of Commissioners of Roads and Revenues of Floyd County shall, by resolution, declare that the running of said engines and cars over any of said bridges has been found to be an interference with, or dangerous and unsafe to the traveling public thereon, or injurious to said bridges, then and in that event said Company shall cease to run its engines across the same."

This charter was again amended by an Act of the General Assembly of Georgia, approved November 12th, 1889, (See Appendix, page 12), providing in the first Section thereof that the Railway Company shall not have the right to use steam power or dummy engines in crossing the County bridges, except with the unanimous consent of the Board of Commissioners of Roads and Revenues of the County. The second Section of the Act provides as follows:

> "That the Board of Commissioners of Roads and Revenues of Floyd County shall not have the right to grant any vested or contract rights to said Rome Street Railroad Company or any other persons, on or over said bridges, but may, in their discretion, grant temporary uses and privileges to said Railroad Company over said bridges, **subject at all times to be revoked by said Commissioners."**

Section Three of that Act repeals all conflicting laws or parts of laws.

The Railway Company claims the rights and franchises granted by the above stated Acts. (See amendment to the Bill of Complaint, Rec., pages 14 and 15.)

By amendment to the original Bill of Complaint, (See Record, page 16), the Railway Company claims that the Street Railroad Company laid its tracks over the bridge across the Etowah river at Second Avenue, in the year 1885, and operated cars thereon by horse power continuously, until the year 1892, and during the latter year, it adopted the use of electric power to propel its cars, and extended its lines over and beyond all three of the bridges, and claims that cars have been run over all of said bridges since the system was first equipped for operation by electricity, which was at a time not later than April, 1893.

It will thus be seen that under the allegations of the Bill of Complaint and the amendments thereto, the only line the Company had in operation across any of the bridges when the Acts of the General Assembly above referred to amending its charter were passed, was the one across the Etowah river at Second Avenue, and that the lines were extended across the other bridges at a time subsequent to 1892, and not later than April 1st, 1893.

On February 25th, 1892, at the time said Company began the use of electricity as a motive power, another contention arose as to the right of the Railway Company to use said bridges, and that question was then settled by a contract, dated February 25th, 1892, allowing the Company to run its electric cars across said bridges, by paying One Hundred ($100.00) Dollars annually for each bridge used. (See Record, page 17.)

This contract remained in force until another similar contract was executed on February 3rd, 1896, (Record, page 18.)

These contracts were evidently made, in accordance with the provisions of the second Section of the Act of Nov. 12th, 1889, (Appendix, page 12), empowering the Commissioners of Floyd County to grant the Railway Company the temporary use of the bridges, subject to revocation at any time.

In 1901, the City Electric Railway Company having succeeded to the property, franchises, etc., of the Rome Street Railroad Company, attempted to avoid the payment of this sum and claimed the right to cross the bridges without compensation, but their contentions were denied by the Supreme Court of Georgia, in the case of City Electric Railway Company vs. Floyd County, 115th Ga., 655, the Court saying:

> "If the Railroad Company originally had the right, under the power granted to it by the Legislature, as we are inclined to think it had, to construct and operate its lines over the bridges in question * * * it lost this right when the dispute between it and the County was compromised and settled by the execution of this contract."

It will be noted that ever since the Company has been using electric power, and ever since it has been using the Broad Street and Fifth Avenue bridges in any way, it has been under and by virtue of these agreements, which necessarily end with the destruction of those bridges.

In accordance with the provisions of the Act of the General Assembly of Georgia, approved February 29th, 1876, (See Appendix, page 26), which was made applicable to street railroads by the Act approved August 31st, 1891, (See Appendix, page 27), J. King and his associates, on September 17th, 1894, field a certificate in the office of the Secretary of State, (See Appendix, pages 18 et seq.), setting up that they were the purchasers of the old Rome Street Railroad Company, and asking to be incorporated under the name of City Electric Railway Company, and requesting to be substituted for the original incorporators and stockholders of said Company, with all their powers, rights, privileges, duties and liabilities. The mere filing of this petition and certificate, as provided by the Act, constituted the charter of the City Electric Railway Company. By incorporating under the terms of and in accordance with the provisions of this Act of 1876, the charter of the City Electric Railway Company thereby became subject to all the provisions of that Act, and, especially as applicable to this case, to Section Eight thereof, as follows:

> "That nothing in this Act shall operate to vest in any purchaser of any railroad and its franchises any exemption from taxation, existing or claiming to exist in the corporation, which shall have been the owner of said railroad and its franchise, or to limit the powers of the Legislature to alter, modify or withdraw the charter and franchises herein provided."

This provision thereby became a part of the charter of the City Electric Railway Company.

It is contended by counsel for appellant that there was never any general law for the incorporation of street railway companies, until the passage of the Act approved December 27th, 1894, but in this contention he is clearly mistaken, as will be noted by reference to the Acts of the General Assembly above referred to, authorizing purchasers of railroads to form corporations, etc., under which the City Electric Railway Company obtained its charter. The Act of 1894 was not passed until after the City Electric Railway Company had obtained its charter.

The charter of the Rome Railway & Light Company was obtained on November 30th, 1906, (See Appendix, pages 20-26), in accordance with the general law of the State with reference to incorporations of street railroads, as contained in Sections 2600 to 2604 inclusive, of the Code of 1911. Section 2600, (Appendix, page 3), provides

> "That all street railroad companies incorporated under this division, shall be subject to all just and reasonable rules and regulations by the corporate authorities, and shall be liable for all assessments and other lawful burdens that may be imposed upon them from time to time."

The certificate of incorporation granted to that Company by the Secretary of State, in accordance with the provisions of Section 2161 of the Code of 1895, Section 2579 of the Code of 1911, (Appendix, page 25), recites

> "The State of Georgia grants unto the above named persons, their successors and assigns, full authority, by and under the said name, Rome Railway & Light Company, to exercise the powers and privileges of the corporation, with all the powers, rights, privileges and duties of the stockholders of said City Electric Railway Company and all the liabilities imposed by law, subject also to the provisions of Article Four of the Constitution of this State, and to all the laws governing street railroad Companies, of force at the date of this certificate, or that may hereafter become of force, either by Constitutional or Statute law or otherwise, which governs and controls the operation of street railroads of this State."

The present charter of the Rome Railway & Light Company, therefore, is subject to all of the rights and powers reserved in the State or in the Board of Commissioners of

Roads and Revenues of Floyd County, by all of the Acts hereinbefore referred to, constituting the charter of the Rome Street Railroad Company, as well as the reservation in the Act of 1876, which became a part of the charter of the City Electric Railway Company, and the reservations specifically set out in the certificate of incorporation granted to said Rome Railway & Light Company.

In addition to these express reservations hereinbefore referred to, which are a part of the charter of the Railway Company, the Constitution of Georgia, adopted in 1877, and now of force, specifically provides in Article One, Section Three, Paragraph Two, (Ga. Code of 1911, Sec. 6389), that no law

> "Making irrevocable grants of special privileges or immunities, shall be passed." (See Appendix, page 1.)

The general law of the State of Georgia, in force at the time the original charter of the Rome Street Railroad Company was granted in 1884, expressly reserved the right to withdraw, change, modify or destroy the franchise granted to any corporation, unless such right is expressly negatived in the charter. Those provisions of law, which are still of force, are as follows: Section 2239 of the Code of 1911 provides

> "In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchises, unless such right is expressly negatived in the charter."

Again, Section 2159 of the Code of 1911 provides

> "Persons are either natural or artificial. The latter are the creatures of the law, and except so far as the law forbids it, subject to be changed, modified or destroyed, at the will of their creator; they are called corporations."

These provisions of the statute law were in the Code of

1882, Sections 1682 and 1651; and in the Code of 1895, Sections 1880 and 1802.

Both by the Constitution and the general laws of the State, the right to withdraw, change or modify any franchise granted to a corporation is expressly reserved, in addition to the reservations contained in the charter claimed by the Railway Company, and this right is not negatived in that charter.

In 1914 the bridges across the rivers became unsafe for general travel, and it became necessary to condemn the same and to construct new ones. The General Assembly of Georgia passed an Act which was approved August 15th, 1914, vesting the title to these bridges in the County, and withdrawing all franchises previously granted to any street railroad or other corporation, to cross bridges erected at the points named, upon certain conditions therein set out. (See Appendix, pages 13-17). The Rome Railway & Light Company, in accordance with the provisions of that Act, filed its Bill of Complaint, seeking to have said Act declared void, and to enjoin the defendants from denying or questioning its right to use said bridges, when constructed, free of any charge, and from interfering with its crossing said bridges, as well as from attempting to collect any portion of the cost of re-constructing the same. The defendants moved to dismiss this bill, which motion was sustained by the Court below, and from that decision this appeal is taken.

ARGUMENT

I

THE FRANCHISE GRANTED TO THE ROME STREET RAILWAY CO. HAS EXPIRED

All of the Acts of the General Assembly of Georgia, specified and referred to, as constituting the charter of the Rome Street Railway Company, are silent as to the length of time for which the rights therein given are granted. It is contended by the appellant that this gave the Company a perpetual franchise. We submit, however, that this contention is incorrect, as this question is controlled by the provisions of Section 2215 of the Code of Georgia of 1910, (Appendix, page 3), which provides as follows:

> "Corporations have continuous succession during the time limited by their charter, notwithstanding the death of their members. Should any charter granted in future by the General Assembly, to a private corporation, be silent as to its continuance, such charter shall expire at the end of thirty years from the date of its grant."

This same provision was embodied in the Code of Georgia of 1882, Section 1678, and in the Code of 1895, Sec 1851.

The original charter of the Rome Street Railroad Company having been granted in 1884, all rights thereunder expired in 1914, and the Rome Railway & Light Company, as the successor, took no greater rights than contained in this original grant.

Under these circumstances, either the General Assembly of Georgia or the governing authorities of Floyd County could require the Railway Company to remove its tracks from the bridges.

Detroit United Railway vs. City of Detroit, 229 U. S., 39.

Cleveland Electric Railway Co. vs. Cleveland, 204 U. S., 116, 139-141.

II

The Act of August 15th, 1914, is valid by reason of the provision in the Company's charter (Appendix, page 12), limiting the right to cross the bridges to temporary use, subject to revocation at any time, and other similar reservations in the charter.

The Act of November 12th, 1889, Sec. 2, (Appendix, page 12), which under the allegations of the amended Bill of Complaint is expressly adopted and claimed as a part of its charter, declares that the County authorities

> "Shall not have the right to grant any vested or contract rights to said Rome Street Railroad Company, or any other persons on or over said

> bridges, but may, in their discretion, grant temporary uses and privileges to said Railroad Company over said bridges, **supject at all times to be revoked by said Commissioners."**

Other reservations in the charter have already been pointed out.

This right to revoke the temporary use granted the Company, as well as the reservation in the charter of the City Electric Railway Company of the right to alter, modify or repeal, was a part of the contract itself, and the subsequent exercise of such a right could not impair the obligation of the contract, and would not be a taking of property without due process of law.

Greenwood vs. Union Freight Railroad Co., 102 U. S. 20.

Hamilton Gas Light & Coke Co. vs. City of Hamilton, 146 U. S., 258.

Looker vs. Maryland, 179 U. S., 46-52.

Bridge Co. vs. United States, 105 U. S. 470, 481.

In Hamilton Gas Light & Coke Co. vs. City of Hamilton, 146 U. S., 270, this Court laid down the rule to be as follows:

> "A legislative grant to a corporation, of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the Legislature may alter or revoke it, a law altering or revoking or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the Legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation by accepting the grant, subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation."

In the case of Bridge Co. vs. United States, 105 U. S., 470, 481, this Court says:

> "It is next insisted that if, in the judgment of Congress, the public good required the bridge to be removed or alterations to be made in its structure, just compensation must be made the Company for the loss incurred by what was directed. It is true that one cannot be deprived of his property without due process of law, and that private property cannot be taken for public use without just compensation. In the present case, the Bridge Company asked of Congress permission to erect its bridge. In response to this request permission was given, but only on condition that it might be revoked at any time if the bridge was found to be detrimental to navigation. This condition was an essential element of the grant, and the Company in accepting the privileges conferred by the grant assumed all risks of loss arising from any exercise of the power which Congress saw fit to reserve. What the Company got from Congress was the grant of a franchise, expressly made defeasible at will, to maintain a bridge across one of the great highways of commerce. This franchise was a species of property, but from the moment of its origin its continued existence was dependent on the will of Congress, and this was declared, in express terms, on the face of the grant by which it was created. In the use of the franchise thus granted, the Company might and it was expected would acquire property. The property thus acquired Congress could not appropriate to itself by a withdrawal of its assent to the maintenance of the bridge that was to be built, but the franchise, by express agreement, was revocable whenever, in the judgment of Congress, it could not be used without substantial and material detriment to the interest of navigation. A withdrawal of the franchise might render property ac-

> quired on the faith of it, and to be used in connection with it, less valuable, but that was a risk which the Company voluntarily assumed when it expended its money under the limited license which alone Congress was willing to give. It was optional with theCompany to accept or not what was granted; but having accepted, it must submit to the control which Congress, in the legitimate exercise of the power that was reserved, may deem it necessary for the common good to insist upon."

III

The Constitution and statute law of Georgia reserve the right to repeal, alter or amend, the charter of every private corporation, and the exercise of such right does not impair the obligation of the contract, and is not the taking of property without due process of law.

The right to repeal, alter or amend, the charter of every corporation is reserved by the State of Georgia, in its Constitution (Appendix, page 1), and in its statute laws (Appendix, page 1-2), and such right is not negatived in the charter of the Company.

Where such a right is reserved, it may be exercised by the State at any time, and such charter right being held subject to the power of the State to repeal, alter or amend, is not protected by the contract clause of the Federal Constitution against subsequent impairment, and all of the powers of the corporation are held, subject to the reserve power of the State to modify its charter and to impose additional burdens upon the enjoyment of its franchise.

San Antonio Traction Co. vs. Altgelt, 200 U. S., 304.

Missouri Pacific Railway Co. vs. State of Kansas, 216 U. S., 262.

Fairhaven Railroad Co. vs. City of New Haven, 203 U. S., 379.

United States vs. Union Pacific Railroad Co., 160 U. S., 1, 37.

People vs. Cook, 148 U. S., 397, 411.

Gibbs vs. Consolidated Gas Co., 130 U. S., 396-408.

Sioux City Street Railroad Co. vs. Sioux City, 138 U. S., 98-108.

Spring Valley vs. Schottler, 110 U. S., 347.

Atlantic & Gulf Railroad Co. vs. State of Georgia, 98 U. S., 359.

The Schottler case, above referred to, lays down the rule that when changes of a legislative charter are within the scope of a legislative power, the Courts cannot interfere with the discretion of the Legislature.

The case of Atlantic & Gulf Railroad Company vs. State of Georgia, above cited, deals with the identical provisions of the statutes of Georgia, now relied on, and lays down the rule that corporations chartered by the State of Georgia are subject to the provisions of the Code, which reserved the right of the legislature to withdraw its charter, or to change, modify or destroy it. That case involved a charter granted under the Constitution of 1863, which instrument did not contain any reservation, the only reservation being in the statute law. The Constitution of 1877 specifically provides that no irrevocable rights or franchises may be granted, and the same statutes passed on in that case are still in force.

The appellant relies upon a provision in the Constitution of the State of Georgia, which provides as follows:

> "No grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to the corporators or creditors of the incorporation."

This provision of the Georgia Constitution of 1877 has been considered by the Supreme Court of Georgia, in connection with the provision declaring that no irrevocable rights or franchises should be granted, and the statutes of the State, to which we have referred, in only one case, and the Court then held that the charter of a railroad company could be amended even though the effect of the amendment would be to burden the Company with a large additional expense.

Macon R. R. Co. vs. Gibson, 85 Ga., page 1.

After quoting from the Supreme Court of the United States, in the case of Railroad Company vs. Georgia, 98 U. S., 359, to the effect that the provisions of the statutes of Georgia became in substances a part of the charter of every corporation, the Court says:

> "No Constitutional principles are infringed by exercising a reserved power to revoke special privileges or immunities, unless the provision of our constitution is violated which forbids doing it in such manner as to work injustice to the corporators or creditors of the corporation. Whether the mode adopted by the Legislature in a given instance is just in this respect or not, whilst primarily a Legislative question, may, if palpably wrong, become a judicial question. But there is not the slightest indication of injustice in the amendment which we are considering. We see not why the Legislature, had it thought proper, could not have passed such an amendment, and made it a part of the charter, by simply enacting that if the Company brought its road within five miles of Thomaston, it should locate and construct its line through the town, wholly irrespective of the comparative cost of two or more routes. To require this to be done on the further condition that any increased cost should be provided for and paid by others, was giving the company a gratuitous, rather than a necessary, measure of justice. But for the voluntary grant from the legislature, the company would have no right to construct and use over the lands of the citizens of Upson any railroad whatever; and permission to do so, attended with an express reservation of a right to re-

> voke or modify the permission, was no pledge to the company that it might build its road where it pleased, notwithstanding the Legislature might please to order otherwise. The charter was as much qualified by the terms of the Code above quoted as if these sections of the Code had been incorporated in the charter itself. For the corporation to complain that the Legislature did what it reserved the right to do, and did it before any portion of the line had been constructed in Upson County, seems to us wholly without reason."

Tilley vs. Savannah, etc., R. R. Co., 5 Fed. 641.

In this case the Act establishing the Railroad Commission of Georgia and giving it authority to fix rates, etc., was attacked on the ground that it was in violation of this provision of the Constitution of the State of Georgia, and it was contended that the rates fixed by the Commission were oppressive, and destructive of the value of the property of railroad companies, but it was held by the Court that the Act was valid, notwithstanding this provision of the Constitution.

In view of the decisions of this Court and of the Supreme Court of Georgia, above cited, the Act of August 15th, 1914, is not unjust or oppressive, and is not repugnant to the provision of the Constitution of Georgia relied on by appellant.

Decisions of State Courts construing the State Constitution and statutes are regarded as controlling when their application involves no infraction of any right granted or secured by the Constitution of the United States.

Old Colony Trust Co., vs. Omaha, 230 U. S., 100.

IV

THE ACT IN QUESTION IS A VALID EXERCISE OF THE POLICE POWER

We insist that the Act in question is a valid exercise of the police power of the State. This Court has repeatedly held that railway companies may be required by the State or by a duly authorized municipality, acting within its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the Company, as a matter of law, is damnum absque injuria, or deemed to be compensated by the public benefit, which the Company is supposed to share.

Missouri Pacific R. R. Co., vs. Omaha, 235 U. S., 121.

C. M. & St. P. Railway Co., vs. Minneapolis, 232 U. S., 430.

Northern Pacific Railway Co., vs. Duluth, 208 U. S., 583.

Wabash R. Co. vs Defiance, 167 U. S., 88.

In Wabash R. Co. vs. Defiance, above referred to, it seems that the municipality had authorized the construction of a bridge over the Company's tracks, and that it subsequently passed an ordinance requiring the removal of the bridge and approaches by the Company, at its own expense, for the purpose of again bringing the streets to a grade crossing. This was attacked as in violation of the provisions of the fourteenth amendment, but this contention was not sustained, and the Court says:

> "We are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised; or what the motives were for making the change; or whether the crossing so improved was burdensome to the railroad company; or made unsafe to persons crossing the track. These were considerations which might properly be urged upon the common council as arguments against the proposed change; but it is beyond the province of the Courts either to praise the wisdom or criticize the unwisdom of such acts. The question before us is simply whether the council had the power to make the change, and of this we have no doubt."

In the case of Missouri Pacific R. Co. vs. Omaha, above cited, this Court held that it was consistent with due process of law to require a railway company to erect overhead crossings or viaducts at its own expense, and said further

> "In the exercise of the police power, it may happen as it often does, that inequality results which the law is powerless to redress. It is only in those clear and unmistakable cases of abuse of legislative authority that the Court is authorized under Section of the Federal Constitution, to enjoin the exercise of legislative power."

In the case of Chicago & Alton R. Co. vs. Tranbarger, 238 U. S., 67, 77, and other cases cited therein, this Court has held that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity.

The car lines of the Railway Company are cut into four parts by the rivers, and can only be connected by bridges erected by the Company at its own expense, or by the use of such bridges as may be erected by the County of Floyd, upon such conditions as may be fixed. There is no obligation on the County of Floyd to erect or maintain bridges at all. The erection of these bridges under the laws of Georgia, is discretionary with the County authorities. Certainly there is no obligation, express or implied, upon the County, to erect bridges capable of carrying the Company's cars. It would seem to be unreasonable that the County should erect such a bridge entirely at its own expense, for the benefit of the railway company. It would be in the discretion of the County authorities to erect bridges which would be safe for the use of the general public, by ordinary means of transportation, but which would be entirely unsafe for carrying the Company's cars. Should this be done, it would be within the province of the State, and possibly of the County authorities, to forbid the use of such bridges by the Company. Such action would clearly be within the police power of the

State. The Act in question, however, implies that the County authorities may build bridges of such design and capacity as would render them safe for street railroad purposes, and if so built, the use thereof by any street railroad company is made subject to such terms and limitations as may be fixed by the County authorities, and authority is given by the Act to require of any street railway company the payment of a sum equal to one-third of the actual cost of construction. Acting upon this authority, the County authorities have required the payment of that sum as a condition precedent to the use of the bridges. We submit that the Railway Company cannot complain of this legislation.

V

CONSTRUCTION OF THE ACT OF AUGUST 15, 1914

It is contended in the amendment to the Bill of Complaint that the Act does not authorize the imposition upon the Railway Company of any part of the cost of the bridges, but that this provision of the Act applies only to corporations which might hereafter desire to cross the bridges.

While not as carefully worded as it might have been, the intention of the Act is clear. The Fourth Section, properly construed, means that it is discretionary with the County authorities whether or not they will grant a franchise to any new corporation to operate cars on and over the bridges, but as to any company now having a franchise, they have no such discretion, but must grant it the right to cross, upon its complying with the reasonable conditions imposed by the Board of Commissioners and the terms of the Act itself. As to any new corporation desiring the right to cross the bridges, the County authorities might, if they saw fit, arbitrarily refuse to grant such a right or franchise. As to any corporation already having a franchise, they have no such arbitrary right. As to all corporations, however, the County authorities are given the exclusive power to fix the terms upon which the bridges may be crossed, and are authorized to require the payment of one-third of the entire cost of the bridges as a condition precedent to the use thereof.

OPINION OF THE DISTRICT COURT

This opinion sustained the validity of the Act, holding that it was evidently passed in the exercise of the police powers of the State and construes the Act as providing

> "For the condemnation and tearing down of the old bridges in the interest of and for the safety of the public, and for the same reason, for the erection of new bridges."

It is also held that even if the company has acquired rights to use the old bridges, such rights would be entirely destroyed when the bridges became useless and dangerous and large expense would necessarily be incurred in the erection of new bridges. It is held that the power would then exist to fix such proportion of the cost of erecting new bridges to be born by street railway companies desiring to use the same, as the Legislature might deem reasonable, provided it was not so grossly unfair as to render the same entirely unreasonable and unjust.

The dismissal of the bill is a finding that there is nothing unreasonable or unjust in the amount fixed.

Irrespective of these questions, however, it is held that the Company has no such vested interests, or such right to use the bridges as would give it any right to object to the Act or to its terms, but on the contrary, that the right to occupy the bridges was in effect expressly subject to revocation or discontinuance.

The decision of the Supreme Court of Georgia, in the case of County of Floyd vs. Rome Street Railroad Company, 77 Ga., 614, so much relied on by appellant, is held to be not now important, in view of the passage of the Act of 1914.

It is further held that there is nothing in the bill or in anything to which it refers which gives the Company any right to enjoin the enforcement of the Act of August 15, 1914. The bill was dismissed.

All questions made were determined against the contentions of appellant.

VII

CONCLUSION

In the argument of the case in the lower Court, as well as in the brief filed in this Court, Counsel for appellant apparently assumes that there is an obligation on the part of the County to construct these bridges and to make them strong enough to carry the company's cars. There is no such obligation. On the contrary, the building of the bridges is entirely discretionary with the County authorities.

It is also assumed that there was no reservation of the right to revoke, alter, or amend the charter of the Company, or to pass any law which would have that effect. We have already pointed out that this reservation is in the charter of the Company, and has been a part of the constitution and statute law of the State of Georgia, since long before either the present company or its predecessors were chartered.

In view of these erroneous assumptions, it seems to us that the decisions cited by Counsel for appellant are inapplicable.

We most respectfully submit the case on the authorities already cited.

Respectfully submitted,

JOEL BRANHAM,
MARK B. EUBANKS,
GEO. E. MADDOX,
Solicitors for Floyd County, Ga.

APPENDIX TO BRIEF

(Containing Georgia Laws Cited.)

I

CONSTITUTIONAL PROVISIONS

Georgia Constitution, Article 1, Section 3, Paragraph 2.

(Ga. Code of 1911, Section 6390.)

"No bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities, shall be passed."

Georgia Constitution, Article 1, Section 3, Paragraph 3.
(Ga. Code of 1911, Section 6390.)

"No grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to the corporators or creditors of the incorporation."

Georgia Constitution, Article 4, Section 2, Paragraph 2.
(Ga. Code of 1911, Section 6464.)

"The exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as property of individuals; and the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State."

II

STATUTORY PROVISIONS

(Ga. Code of 1911, Section 2239.)

"In all cases of private charters hereafter granted, the

State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter."

(Ga. Code of 1911, Section 2159.)

"Persons are either natural or artificial. The latter are the creatures of the law, and, except so far as the law forbids it, subject to be changed, modified, or destroyed, at the will of their creator; they are called corporations."

(Ga. Code of 1911, Section 2579.)

"When said petition has been filed with said secretary, he shall issue to said company under the great seal of the State the following form of certificate, to-wit:

"To all to whom these presents may come—Greeting:

"Whereas, In pursuance of an Act of the General Assembly of the State of Georgia, approved December 17th, 1892, and (naming the persons who sign the petition) having filed in the office of Secretary of State a certain petition seeking the formation of a corporation to be known as (here insert name), with a capital stock of $.................., for the purpose of constructing, equipping, maintaining, and operating a railroad from.............................to..........................., and having complied with the statutes in such cases made and provided; therefore the State of Georgia hereby grants unto the above named persons, their successors and assigns, full authority, by and under the said name of........................., to exercise the powers and privileges of a corporation for the purposes above stated, subject to the provisions of Article 4 of the Constitution of this State, and all the laws governing railroad companies of force at the date of this certificate, or that may hereafter become of force, either by constitutional or statute law, or by any rules and regulations of the railroad commission of this State, or otherwise, which govern and control the operation of railroads in this State.

"In witness whereof, these presents have been signed by the Secretary of State, and to which is annexed the great seal of the State, at Atlanta, Ga., this........................ day of ...., 18......"

Thereup on persons who signed said petition and all persons who shall become stockholders in such company shall be a corporation by the name specified in said petition and certificate and shall possess the powers and privileges and be subject to the provisions contained in this Article. Before the Secretary shall issue said certificate, the petitioners shall pay to the Treasurer of the State a fee of one hundred dollars."

(Ga. Code of 1911, Section 2215.)

"Corporations have continuous succession during the time limited by their charter, notwithstanding the death of their members. Should any charter granted in future by the General Assembly to a private corporation be silent as to its continuance, such charter shall expire at the end of thirty years from the date of its grant."

(Ga. Code of 1911, Section 2600.)

"All the provisions of the preceding division shall govern in the incorporation, control, and management of suburban and street railroad companies, in so far as the same are applicable and appropriate thereto. Any number of persons, not less than ten, who desire to be incorporated for that purpose, may form a company as provided in the preceding division, with this additional requirement: That they must in their petition specify what city, town, or village, and in what streets thereof, they propose to construct and build said railroad: Provided, that no street railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: And provided further, that all such street railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time: And provided further, only such of the powers and franchises that are conferred by said divisions shall belong to said street railroad companies as shall be necessary and appropriate thereto; and in case any street railroad incorporated under this division shall be partly located in an incorporated town or city and partly located in the country, then the provisions of the preceding division which apply to other railroads located in the country shall apply to it so far as that portion of its road is concerned: And provided further, that nothing in paragraph 2594 of the preceding division, which provides that the general direction and location of railroads sought to be constructed in this State shall be ten miles from a railroad constructed or laid out and selected to be constructed, shall be or be held applicable to electric street, suburban, or interurban railways, or the selection of the route or the construction of the same."

III

COMMISSIONERS OF FLOYD COUNTY AUTHORIZED TO PURCHASE BRIDGES

No. 265

An Act to authorize the County of Floyd, by its Board of Commissioners of Roads and Revenues, to issue bonds of said county for not exceeding the sum of eighty thousand dollars, and to provide for the assessment and collection of an annual tax to pay the principal and interest of the same, in compliance with article 7, section 7, of the constitution, for purchasing the three bridges across the Etowah and Oostanaula rivers, at Rome, for the use and benefit of said county.

Sec. III. BE IT FURTHER ENACTED, That said Commissioners are hereby authorized to sell said bonds at not less than par, and with the proceeds to purchase the bridges across the Oostanaula and Etowah rivers at the city of Rome, for the use and benefit of said county of Floyd; PROVIDED, that the said Commissioners shall have no power to purchase one of said bridges alone, but shall purchase all of said bridges, if any are purchased.

Approved September 23rd, 1881.

The other sections of above Act are not material.

IV.

ORIGINAL CHARTER

(Ga. Laws, 1884-5, pp. 191-2.)

AN ACT TO INCORPORATE THE ROME STREET RAILROAD COMPANY AND TO DEFINE ITS POWERS, THE MAYOR AND COUNCIL OF THE CITY OF ROME HAVING GIVEN ITS CONSENT TO THE AUTHORITY HEREINAFTER GRANTED, SAID CONSENT BEING EVIDENCED BY A CERTIFIED COPY OF THE OFFICIAL ACTION OF THE SAID MAYOR AND COUNCIL EXHIBITED IN BOTH BRANCHES OF THE LEGISLATURE BEFORE THE PASSAGE OF THIS BILL.

Section 1. THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA DO ENACT, That Joseph F. McGhee, B. I. Hughes, T. F. Howell, Daniel Lowrey, and such others as may associate with them, and their successors and assigns, be, and they are hereby declared a body politic and corporate, by the name and style of the Rome Street Railroad Company, and in and by that name may sue and be sued, plead and be impleaded in any Court of law or equity in this State, or where their rights may come in question; may have and use a common seal, and the same alter or destroy at pleasure, and purchase, hold, accept, enjoy or convey any property, real, personal or mixed, that may be necessary for the purpose hereinafter set forth, or which they may acquire in the course of their business.

Section II. That said company shall have power and authority to survey, lay out, construct, and equip, use and employ street railroads in the city of Rome, and Floyd County, to-wit: From the railroad depot in East Rome, through Howard Street to Broad Street and through the whole length of said Broad Street, and along the extension of Broad Street to the bridge across the East Tennessee, Virginia and Georgia Railroad in the town of Forrestville, and also through South and Bridge Streets, or any parts thereof, and through Court Street and any other street in said city, and through any and all future extensions of said streets, or any of them, and said company may use as motive power for their cars horses or electricity, or underground cables, driven by steam, or any other appliance that may hereafter be invented or used as motive power.

Section III. That the capital stock of said company shall be Ten Thousand Dollars, which may be increased to the sum of One Hundred Thousand Dollars should the business of the company require it, books of subscription for which shall be opened in the city of Rome. Said stock shall be divided into shares of One Hundred Dollars each, and be issued and transferred in such manner and upon such terms and conditions as the Board of Directors of said company may determine. Each share of One Hundred Dollars shall be entitled to one vote in all elections and meetings held by the stockholders.

Section IV. That all corporate powers of said company shall be vested in and exercised by a Board of Directors, and such officers and agents as said Board shall appoint, which said Board of Directors shall consist of five members, who shall be stockholders in said company, the first Board of Directors to be elected at such time and in such manner as said corporators, or a majority of them, may determine, and annually thereafter by the stockholders of said company. Said directors shall hold office until their successors are elected and qualified, and they may fill any vacancy that may happen in the Board by death, resignation, or otherwise. They may also adopt such by-laws, rules and regulations for the government of said company and the management of its affairs and business as they may think proper, not inconsistent with the laws of this State and of the United States.

Section V. That said Rome Street Railroad Company may convey on their lines passengers or freight, as the exigencies of the business community and public wants may require, and may charge reasonable and just rates for such transportation.

Section VI. That all laws and parts of laws in conflict with this Act, be and the same are hereby repealed.

Approved December 12, 1884.

V

FIRST AMENDMENT TO CHARTER

(Ga. Laws, 1884-5, pp. 235-6.)

AN ACT TO AMEND "AN ACT TO INCORPORATE THE ROME STREET RAILROAD COMPANY, AND TO DEFINE ITS POWERS, THE MAYOR AND COUNCIL OF THE CITY OF ROME HAVE GIVEN ITS CONSENT TO THE AUTHORITY HEREINAFTER GRANTED, SAID CONSENT BEING EVIDENCED BY A CERTIFIED COPY OF THE OFFICIAL ACTION OF SAID MAYOR AND COUNCIL EXHIBITED IN BOTH BRANCHES OF THE LEGISLATURE BEFORE THE PASSAGE OF THIS BILL," APPROVED DECEMBER 12, 1884, SO AS TO AUTHORIZE SAID COMPANY TO EXTEND ITS LINES OF STREET RAILROAD THROUGH ALL THE STREETS OF THE TOWNS OF DESOTO, FORRESTVILLE, EAST ROME AND SOUTH ROME, IN FLOYD COUNTY, GEORGIA, AND ALSO TO EXTEND ITS LINE OF STREET RAILROAD TO A DISTANCE OF NOT EXCEEDING FIVE MILES FROM THE CORPORATE LIMITS OF THE CITY OF ROME, ALONG AND UPON ANY PUBLIC ROAD LEADING INTO SAID CITY, AND FOR OTHER PURPOSES.

WHEREAS, The corporate authorities of the towns of East Rome, South Rome, Forrestville and DeSoto, in Floyd County, in this State, have consented thereto, as evidenced by certified copies of the official action of said towns exhibited to this General Assembly as required by law: therefore,

Section I. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THIS STATE, That from and after the passage of this Act, The Rome Street Railroad Company, in addition to the powers heretofore granted to it, shall be, and it is hereby authorized and empowered to extend its lines of street railroad through and along any and all of the streets, lanes and alleys of the towns of East Rome, South Rome, Forrestville, and DeSoto, and shall also have the power and authority to extend its lines as much as five miles beyond the corporate limits of the city of Rome, along any public road leading into said city of Rome.

Section II. BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That the president and directors of the Rome Street Railroad Company, are hereby authorized to borrow money, issue bonds and mortgage its property and franchise to secure the payment of said bonds: Provided, that before said company shall extend its lines along any of the public roads outside of the corporate limits of said towns, they shall first obtain the consent of the Board of Commissioners of roads and revenue of said County of Floyd to do so.

Section III. BE IT FURTHER ENACTED, That all laws and parts of laws in conflict with this Act, be and the same are hereby repealed.

Approved October 7, 1885.

VI

SECOND AMENDMENT TO CHARTER

(Ga. Laws, 1887, pp. 148-150.)

AN ACT TO AMEND AN ACT ENTITLED AN ACT TO INCORPORATE THE ROME STREET RAILROAD COMPANY AND TO DEFINE ITS POWERS, ETC., APPROVED 12th DAY OF DECEMBER, 1884.

Section I. BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA, That said street railroad company may use as motive power for their cars, motors, commonly called dummy engines, propelled by steam, or any other steam motor that may be hereafter invented or used, which are, or may be as well adapted to the purpose as are dummy engines now in general use, on the following streets and along all or any part thereof, the said city and towns having already consented thereto, as evidenced by their official action exhibited to this General Assembly, to-wit: Broad, Howard and Bridge streets in the city of Rome, the extension of Howard street and such other streets in the

Fourth Ward of said city as it may be necessary to use in reaching the present bridge, on Bridge Street, from the West Rome depot in said ward. When a new bridge is built at that site, and may pass over the bridges in said city, subject, however, to such regulations for the safety and convenience of the traveling public and the safety and preservation of the bridges, as may be prescribed from time to time by the Board of Commissioners of Roads and Revenues of Floyd County, the rate of speed not to exceed four miles an hour. No weight or load shall be carried on or over any of said bridges by said company that will subject the same to a greater stress than that shown to be safe by the strain sheets of said bridges and the tracks laid thereon shall be so arranged and kept by said company in such condition as not to interfere with free travel thereon for vehicles: Provided, however, that whenever a majority of the Board of Commissioners of Roads and Revenues of Floyd County shall by resolution, declare that the running of said engines and cars over any of said bridges has been found to be an interference with, or dangerous or unsafe to the traveling public thereon, or injurious to said bridges, then and in that event said company shall cease to run its engines across the same; said engines may also be used on the following streets in East Rome, South Walnut, Oak and Howard Avenues, and along the following public roads, to-wit: The road known as Dean Street to H. M. Tanner's residence, the portion of the Cedartown road lying between the property of the Rome Land Company, and that of B. A. Connelly, Miller & Sons, Hamilton Yancey, J. B. S. Holmes, and the Messrs. Jones, and through any and all portions of the lands of the Rome Land Company, providing said company shall consent thereto, with the right to use and cross the said public roads and to cross railroad tracks whenever and wherever it may be necessary to do so, to build a continuous line of road through said lands, and through the lands of any other person, provided such person shall first consent thereto, or just and adequate compensation is first paid to them. The right to condemn a right of way, not to exceed fifty (50) feet in width, over any and all lands, not occupied by buildings, that may be necessary and proper for said street railroad is hereby given to said company. The proceedings for such condemnation and the assessment of damages therefor shall be as hereinafter provided. Also the following streets in South Rome: Pennington and Branham Avenues, Main Street and Cave Spring road as far South as the Mobley spring, and along Broad Street in Printup City and Forrestville to Printup City depot, and any street or streets in the city of Rome or in said towns, provided, said city or town authorities shall first consent thereto, and provided that said company shall not lay its tracks in any public roads other than those herein named without the consent of the Board of Commissioners of Roads and Revenues of Floyd County, and the roads herein authorized to be used shall be left in good condition and of sufficient width for public travel. In no case shall the macadam or stone track of beaten track of said roads be taken or used for car tracks except to cross the same. The general law of force governing railroads, as to crossing public roads and railroads, shall apply to said street railroads as fully as if the same was an ordinary railroad.

Section II. BE IT FURTHER ENACTED, That said company shall have power and authority to extend its lines as much as five miles beyond the corporate limits of the city of Rome along any public road or street or any town adjacent to the city of Rome; provided, that the consent of the Board of Commissioners of Roads and Revenues of Floyd County shall first be had and obtained before any public road shall be taken or used for such purposes, and the consent of the town authorities shall first be had before any streets are taken or used for such purposes.

Section III. BE IT FURTHER ENACTED, That said company may own and hold any real estate that may be purchased by or conveyed to it for stations or parks in or near its line, and may embrace all such property in any mortgage hereafter, made under authority granted by Section II of the Act, passed October 7, 1885, amending the Act of incorporation of which this Act is amendatory.

Section IV. BE IT FURTHER ENACTED, That all disputed rights-of-way may be acquired by said company as provided by section 1689 (1) of the Code of Georgia of 1882, and all the provisions of said section shall be held, taken and considered as a part of this Act so far as the same may be applicable.

Section V. BE IT FURTHER ENACTED, That all laws and parts of laws in conflict with this Act be, and the same are hereby repealed.

Approved September 21, 1887.

VII

THIRD AMENDMENT TO CHARTER

(Ga. Laws, 1889, pp. 696-7.)

AN ACT TO AMEND AN ACT ENTITLED AN ACT TO AMEND AN ACT TO INCORPORATE THE ROME STREET RAILROAD COMPANY, AND TO DEFINE ITS POWERS, ETC., APPROVED DECEMBER 12, 1884.

Section I. BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA, That the Rome Street Railroad Company shall not have the right to use steam power or dummy engines in crossing the county bridges, either for the transportation of freight or passengers across said bridges except with the unanimous consent of all the Commissioners of Roads and Revenues of Floyd County, declared by public resolution in an official meeting.

Section II. BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That the Board of Commissioners of Roads and Revenues of Floyd County shall not have the right to grant any vested or contract rights to said Street Railroad Company, or any other persons on or over said bridges, but may, in their discretion, grant temporary uses and privileges to said railroad company over said bridges, subject at all times to be revoked by said Commissioners.

Section III. BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That all laws and parts of laws in conflict with this Act be, and the same are hereby repealed.

Approved November 12, 1889.

VIII

ACT APPROVED AUGUST 15, 1914.

(Ga. Laws, 1914, page 487.)

AN ACT:

To vest in Floyd County full and complete title, jurisdiction over and control of the following bridges within the city of Rome, in Floyd County, Georgia, to-wit: Second Avenue bridge, spanning the Etowah river; Broad Street bridge spanning the Etowah River, and Fifth Avenue bridge spanning the Oostanaula River. To revoke any and all permits granted by legislative or municipal or county authorities to any street railway company, electric light, telegraph, telephone or gas company, to lay tracks and operate cars on and over said bridges or to place wires or pipes and operate the same on and over said bridges.

To repeal all franchises heretofore granted to all such public service corporations to operate on and over said bridges, whether granted by legislative, county or municipal authority upon condition. To authorize the County Authorities of Floyd County to condemn and remove the present bridges and to build new bridges at the same points, and to authorize the county to acquire the necessary lands for the purpose of constructing bridges wide enough to meet the demands of public travel.

To authorize said county to require of any street railway company or electric railway company, desiring to lay its tracks on and operate its cars over said bridge, or either of them, to pay to said county a sum equal to one-third of the actual cost of building either of said bridges before any company shall be allowed to lay tracks, place any wires or other equipment or operate any cars on or over such bridges, and to fix the rights of such corporations by reason of such payments.

To grant to the County Authorities of Floyd County the exclusive right and jurisdiction to grant permission and franchises to persons, firms and corporations, exercising public service functions, to operate on or over said bridges, and to prescribe the terms and limitations of such grants.

To provide that any person, firm or corporation, desiring to contest the validity of this Act, shall do so by injunction proceeding before the beginning of the work of tearing down and removing the old bridges and not otherwise.

To provide for the acceptance of this Act by the county and city authorities, and for other purposes.

SECTION I.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, and it is hereby enacted by authority of the same, that from and after the passage of this Act, all rights, title and interest in the following bridges within the city of Rome, said county, to-wit: Second Avenue bridge spanning the Etowah River; Broad Street bridge spanning the Etowah River, and Fifth Avenue bridge spanning the Oostanaula River, together with full and complete jurisdiction over and control thereof, shall be vested in said County of Floyd, and be exercised by the County Authorities of said county.

SECTION 2.

Be it further enacted, That all permits and franchises heretofore granted, either by the General Assembly, the municipal authorities of the city of Rome, or County Authorities of Floyd County, to any street railway company, electric light, telephone, telegraph or gas company to lay tracks and operate cars on or over said bridges, or either of them, or to place wires, pipes and equipment, and operate the same on and over said bridges, are hereby revoked and repealed so far as the same applies to any future bridges hereafter constructed under this or any other law unless the said companies will conform to the reasonable terms and conditions required by the County Authorities.

SECTION 3.

Be it further enacted, That said County of Floyd is hereby authorized to condemn and remove the present bridges and to build new bridges at the same site and is allowed to acquire any necessary lands for the purpose of constructing bridges of sufficient width to meet the demands of the public travel, and all public service corporations, street railway companies, telegraph, telephone, light and gas companies, are required, when notified to do so, to remove all tracks, wires, pipes and other equipment from said bridges and each of them, as required by the County Authorities.

SECTION 4.

Be it further enacted, That the County Authorities of said county are hereby given the exclusive right and jurisdiction to grant permission and franchises to persons, firms and corporations, exercising public service function, to operate on and over said bridges, and to place railway tracks thereon and to operate cars on and over said bridges and to prescribe the terms and limitations of such grants; and the County Authorities of said county are authorized to require of any street railway company or electric railway company as a condition precedent to the laying of tracks, placing wires and operating cars on or over said bridges, that it pay to said county a sum equal to one-third of the actual cost of the building of said bridges, and the sum shall be paid to the Treasurer of said county before any such company shall be allowed to lay any tracks or place any wires or other equipment or operate any cars on or over such bridge, but any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the Board of Commissioners and the terms of this Act.

SECTION 5.

Be it further enacted, That any railway company, electric railway company or other public service corporation, paying the sums required under and by the preceding section shall acquire only the same rights to operate on and over said bridges as they may have had on and over the streets leading to and from such bridges, and shall not be deemed to have any right, title or interest in such bridges or control over the same.

SECTION 6.

Be it further enacted, That any person, firm or corporation desiring to contest the validity of any part of this Act, shall do so by injunction proceeding before the beginning of the work of tearing down and removing of such bridges, and not otherwise. Notice shall be given all persons, firms and corporations of the time when work is to begin by publishing a notice thereof by the Chairman of the Board of Commissioners in the newspaper in which sheriff's sales are advertised. Said notice shall state the time when the work is to commence as near as practicable, and the estimate of the cost of each bridge. Said notice shall be published once a week for two weeks. The last publication to be at least thirty days before work is to begin. Any person, firm or corporation, desiring to object to any terms of this bill, or to any change that may be made thereunder or the levy of any tax or assessment or charge for building the bridge or bridges, shall file an injunction at least twenty days before the date the work is advertised to begin, against the county, stating the objections to the bill, which shall be heard as other injunctions are heard. And the work shall not begin until said injunction suit is finally determined.

SECTION 7.

This Act shall not go into effect until the Board of Commissioners of Roads and Revenues of Floyd County and the Mayor and Council of the city of Rome shall have both passed resolution accepting the terms of this Act.

SECTION 8.

Be it further enacted, That the Board of Commissioners shall, before adopting the resolution putting this Act into effect, request the ordinary to call a special election referring to the people of Floyd County, the question of adopting or rejecting said Act. It shall be the duty of the ordinary to call said election not less than 15 nor more than 30 days after receiving such request. Said election shall be called as special elections are called and those voting for such Act to go into effect shall have printed or written on their ballot the words, "For Bridge Act." Those opposed shall have "Against Bridge Act." The ordinary shall consolidate the vote, and shall certify the result to the Board of Commissioners, who shall declare the result, and shall act accordingly.

SECTION 9.

Be it further enacted, That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

Approved August 15, 1914.

IX

CHARTER OF CITY ELECTRIC RAILWAY COMPANY

STATE OF GEORGIA,

TO THE HONORABLE, THE SECRETARY OF STATE:

This petition and certificate of J. King, J. L. Camp, John J. Seay, E. J. McGhee and S. S. King, all of said State, shows and certifies as follows:

On December 12th, 1884, the General Assembly of said State granted a charter to the Rome Street Railroad Company, with authority to borrow money, issue bonds, and to secure the same by a deed of trust, in pursuance whereof the said Company did issue bonds to the amount of $100,000, and did secure same by a certain deed of trust, which is duly recorded in the office of the Clerk of the Superior Court of Floyd County, to which reference is hereby made.

By said deed of trust, the American Security & Trust Company, of Washington, D. C., the trustees named, were authorized and empowered, in the event of any default in the payment of interest due upon the said bonds, and the continuance of such default for the space of three months, upon receiving written notice of such default, with a written request based thereon from the owners or legal holders of twenty-five per cent of the bonds then outstanding, to sell at public outcry, after advertising for sixty days in a newspaper published in Rome, Georgia, and one published in Atlanta, Georgia, all the property, real and personal, of the said Railroad Company, and all of its rights, privileges, and franchises, all of which are fully described and set forth in the charter of said Company and said deed of trust; to apply the proceeds of the said sale to the payment of said bonds, the principal of which, according to the terms of said deed of trust, was to become due in case of any such default. The surplus of such proceeds, if any, after satisfying the principal and accrued interest due upon said bonds and the expense of the sale to be accounted for to said company.

The said company made default in the payment of said interest for more than twelve months, and said trustees, upon the notice and request aforesaid, and after full compliance as to advertising and in all other respects with the terms and requirements of said deed of trust, did, on the 5th day of July, 1894, lawfully sell all the property, rights, privileges and franchises of said company, to Jno. M. Bonnam, of the City of New York, all of which more fully appears by deed recorded in the office of the Clerk of the Superior Court of Floyd County, Georgia, to which reference is hereby made, said deed being executed September 4th, 1894. Afterwards on the 4th day of September, 1894, the said purchaser, Jno. M. Bonham, did sell and convey to the said J. King, J. L. Camp, Jno. J. Seay, E. J. McGhee and S. S. King, all the property, rights, privileges and franchises aforesaid, which will more fully appear by reference to a deed made by the said Jno. J. Bonham to the said J. King, J. L. Camp, Jno. J. Seay, E. J. McGhee and S. S. King, likewise recorded in the office of the Clerk of the Superior Court of Floyd County, Georgia.

The undersinged desire to exercise and enjoy the same rights, privileges, grants, franchises, immunities and advantages, in or by said trust deed enumerated and conveyed, which belonged to and were enjoyed by the Rome Street Railroad Company, as fully, absolutely and in all respects as said Company, its office holders, share holders and agents might or could have done, had not the aforesaid sales and purchases taken place. Accordingly the undersigned, for the purposes aforesaid, and for the purpose of organizing anew, do now file this, their petition and certificate, and request to be substituted for the original incorporators and stockholders of said Company, with all their powers, rights, privileges, duties and liabilities, and specify as follows:

First: The name and style of this corporation shall be The City Electric Railway Company, of Rome, Georgia.

SECOND: Its principal office shall be in the city of Rome, Ga.

THIRD: The number of directors shall be five, and the directors who are to serve one year and until other successors are elected and installed, are the undersigned, who are hereby chosen and elected as such directors.

FOURTH: The capital stock of this corporation shall be $10,000 with the option of increasing the same to $100,000, divided into shares of $100.00 each.

WHEREFORE, the undersigned, for themselves, their associates and successors, ask that they be made a body corporate and politic, by the name last stated, with all the rights, powers, privileges and franchises set forth in the charter of the Rome Street Railroad Company, or to which they may be entitled under or by virtue of any statute or statutes of said State, applicable now of force, or which may hereafter be enacted, and that a duly certified copy hereof may be their charter for all the purposes aforesaid.

IN WITNESS WHEREOF, your petitioners have hereunto set their hand and seal this the 15th day of September, 1894. J. King, J. L. Camp, John J. Seay, E. J. McGhee, S. S. King.

Office of Secretary of State,

Atlanta, Georgia.

Filed in office Sept. 17th, 1894.
Recorded Sept. 25th, 1894.
H. H. Thomas, Clerk.

X

CHARTER OF ROME RAILWAY & LIGHT COMPANY

STATE OF GEORGIA, COUNTY OF FLOYD:

TO THE HONORABLE PHILIP COOK,
SECRETARY OF STATE.

This petition filed by S. A. Culbertson, L. W. Botts, Attilla Cox, Harry Weissinger, John L. Helm, James, P. Helm, S. S. Bush, J. D. Stewart, C. E. Claggett, all of whom are residents of Louisville, Kentucky, J. W. Ewing and J. E. Dean, residents of Rome, Georgia, sets forth the following facts:

On December 12th, 1884, the General Assembly of the

State of Georgia granted a charter to the Rome Street Railroad Company authorizing it to construct and operate a street railroad and to use electric power in the city of Rome and County of Floyd and State of Georgia, and by amendment conferred upon it authority to borrow money, issue bonds and secure the same on the property and franchises of said Company. Said Company was duly organized and, in the exercise of the power conferred by its charter, it issued bonds to the amount of $100.000, and secured the same by deeds of trust which was duly recorded in the office of the Clerk of the Superior Court of Floyd County, Georgia. By said deed of trust the American Security and Trust Company, of Washington, D. C., was made trustee for the bond holders and was authorized and empowered, in the event of default in the payment of principal or interest on said bonds, and the continuance of such default for the space of three months, upon conditions specified in said deed of trust to sell the property and franchises covered by said deed of trust, at public outcry after advertisement as specified in said deed of trust. Such default in the payment of interest having been made by the said Company, said trustee in compliance and in accordance with the condition named in said deed, did bring said property to sale at public outcry and the same was, on the 5th day of July, 1894, lawfully sold to John M. Bonham of the City of New York, and said trustee did execute a deed of conveyance whereby the title to all the property, rights, privileges and franchises of said Company was on September 4th, 1894, conveyed to said Bonham. Afterwards, to-wit, on said 4th day of September, 1894, said Bonham conveyed said property to J. King, J. L. Camp, John J. Seay, E. J. McGhee and S. S. King. Said deed to Bonham and Bonham's deed to said King and others was duly recorded in the Clerk's office of Floyd Superior Court. Said last grantees being the purchasers of said property, rights, privileges and franchises did on the 17th day of September, 1894, file a petition with the Honorable Secretary of State of Georgia, requesting that they be substituted for the original stockholders in said Rome Street Railroad Company and that they have all the powers, rights, privileges and duties belonging to and imposed upon the stockholders of the Rome Street Railroad Company, together with the liabilities imposed by the laws of Georgia. Whereupon said new corporators proceeded anew by electing new directors, as provided by the laws of Georgia, substituted and disposed of stock and conducted their business generally as provided by law. Whereupon they became a corporation with all the powers, privileges and franchises conferred by law upon them.

In said petition said petitioners asked that the name of said new corporation be The City Electric Railway Company of Rome, Georgia, with its principal office at Rome, Georgia, that its Board of Directors consist of five members and that its capital stock be $10,000, with the option of increasing the same to $100,000 divided into shares of $100 each.

On November 17th, 1899, the directors of said new company duly passed a resolution signifying a desire in behalf of the Company to accept and obtain the provisions of law with reference to electric street and suburban railroad companies furnishing electric light and electric power to consumers, which resolution was duly filed with the Secretary of State and the certificate of the Secretary of State was obtained that such resolution had been filed with him. Thereby said Company became clothed with the powers contained in the second title, Chapter Two, Article Six, Section One and Division Four of the Code of Georgia of 1895, as contained in numbered Sections 2180 to 2184 inclusive of said Code.

On this the 28th day of November, 1906, petitioners agreed upon terms and did purchase with the view of organizing anew the corporation which is hereby proposed to be created, all the property and franchises of said City Electric Railway Company obtained by reason of the charter to said Rome Street Railroad Company and the rights acquired thereunder from the State of Georgia and the several cities in which lines of railroad and electric lighting system of said Company is situated. Which contract of purchase is evidenced by a written proposition made by petitioners to said City Electric Railway Company and by said Railway Company duly accepted.

In addition to the powers obtained by reason of said purchase and by reason of being incorporated anew as provided by law, petitioners desire the following additional powers, privileges and rights:

1st: That the name of the new corporation be Rome Railway & Light Company.

2nd: That the capital stock of the corporation be $500,000, divided into five thousand shares of the par value of $100 each.

3rd: That it be incorporated for the term of one hundred and one years.

4th: That the principal office of the corporation be located in Rome, Georgia, with the right to establish and maintain a branch office in the City of Louisville, State of Kentucky.

5th: That petitioners be incorporated under the laws of Georgia, with all the powers conferred as by statute in such cases made and provided.

6th: That the number of directors of the corporation consist of seven members.

S. A. Culbertson,
Attilla Cox
Harvey Weissinger,
John L. Helm,
James P. Helm,
S. S. Bush,
J. D. Stewart,
C. E. Claggett,
L. W. Botts,
J. W. Ewing,
J. E. Dean,
All by L. W. Bates, Attorney in Fact.

In person appears before the undersigned official, L. W. Botts, who being first duly sworn, deposeth and says, that he is one of the purchasers of the property, rights, privileges and franchises of the City Electric Railway Company, as set forth in the foregoing petition and that the statements in the foregoing petition are true.

L. W. Botts.

Sworn to and subscribed before me
this 28th day of November, 1906.

A. C. Wadsworth, N. P. Floyd Co. Ga.
(Term as Notary expires Sept. 7, 1909.)
(SEAL)

XI

STATE OF GEORGIA.

OFFICE OF SECRETARY OF STATE, ATLANTA.

TO ALL TO WHOM THESE PRESENTS MAY COME—

GREETING:

WHEREAS, in pursuance of an Act of the General Assembly of the State of Georgia, approved December 17th, 1892, and the Acts amendatory thereof, J. E. Dean and J. W. Ewing, residents of the State of Georgia and the County of Floyd, and S. A. Culbertson, Attilla Cox, Harry Weissinger, John L. Helm, James, P. Helm, L. W. Botts, C. E. Claggett, J. D. Stewart and S. S. Bush, citizens of the State of Kentucky, and city of Louisville, having filed in the office of the Secretary of State a certain petition seeking to be substituted for the stockholders of the City Electric Railway Company, of Rome, Georgia, a corporation existing under the laws of Georgia, with all their powers, rights, privileges, duties and liabilities; and seeking also to have the name of said corporation changed to the ROME RAILWAY and LIGHT COMPANY, and to have the capital stock thereof fixed at five hundred thousand ($500,000) Dollars with certain additional powers and privileges specified in said petition; and they having complied with the statutes in such cases made and provided:

THEREFORE, the State of Georgia grants unto the above named persons, their successors and assigns full authority by and under the said name of ROME RAILWAY and LIGHT COMPANY, to exercise the powers and privileges of the corporation, "with all the powers, rights, privileges and duties of the stockholders of said City Electric Railway Company and all the liabilities imposed by law subject also to the provisions of Article Four (4) of the Constitution of this State, and to all the laws governing street railroad companies of force at the date of this certificate or that may hereafter become of force either by Constitutional or Statute law, or otherwise, which governs and controls operations of street railroads in this State."

IN WITNESS WHEREOF, these presents have been signed by the Secretary of State and to which is annexed the Great Seal of the State, at Atlanta, Georgia, the 30th day of November, 1906.

Philip Cook,
Secretary of State of Georgia.

XII

(Ga. Laws, 1876, pp. 118.)

AN ACT TO ENABLE THE PURCHASERS OF RAILROADS TO FORM CORPORATIONS AND TO EXERCISE CORPORATE POWERS, AND TO DEFINE THEIR RIGHTS, POWERS AND PRIVILEGES.

Section I. BE IT ENACTED, ETC., That in the case of the sale of any railroad situated wholly within this State, or partly within this State and partly within an adjoining State, by virtue of any mortgage or deed of trust, whether under foreclosure or other judicial proceeding, or pursuant to any power contained in such mortgage or deed of trust, the purchaser or purchasers thereof, or his or their survivor or survivors, representatives or assigns, may, together with their associates (if any), form a corporation for the purpose of owning, possessing, maintaining and operating such railroad, or such portion thereof as may be situated within this State, by filing in the office of the Secretary of State, of this State, a certificate, specifying the name and style of such corporation, the number of directors of the same, the name of its first directors, and the period of their service not exceeding one year, the amount of the capital stock of such corporation, and the number of shares into which it is to be divided; and the persons signing such certificate, and their successors, shall be a body corporate and politic by the name specified in such certificate, with power to sue and be sued, contract and be contracted with, and to own, possess, maintain and operate the railroad referred to in such certificate, and to transact all business connected with the same; and a copy of such certificate, attested by the Secretary of State or his deputy, shall in all courts and places be evidence of the due organization and existence of such corporation and of the matters specified in such certificate.

Section II. BE IT FURTHER ENACTED, That such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale, under or by virtue of its charter and any amendments thereto, and of other laws of this State, or the laws of any other State in which any part of such railroad may have been situated, not inconsistent with the laws of this State.

Section VIII. BE IT FURTHER ENACTED, That nothing in this Act shall operate to vest in any purchaser of any railroad and its franchises any exemption from taxation, existing or claiming to exist in the corporation which shall have been the owner of said railroad and its franchises, or to limit the powers of the legislature to alter, modify or withdraw the charter and franchises herein provided.

(Sections omitted are immaterial.)

XIII

Ga. Laws, 1891, Vol. 1, pp. 168.)

GENERAL LAW FOR INCORPORATING STREET AND SUBURBAN RAILROADS

No. 342.

An Act to provide a general law for the incorporation of companies to operate street and suburban railroads, and to regulate the same.

Section I. Be it enacted by the General Assembly of the State of Georgia, That all general laws of this State providing for the incorporation of railroads, and to regulate the same, including all laws to enable purchasers of railroads to form corporations, and to exercise corporate powers and define their rights, powers and privileges, both the original statutes and all amendments thereto, be, and the same are, hereby made applicable to all street and suburban railroad companies to be incorporated for building or having railroads for the carriage of freight and passengers or either, and for their railroads run by whatever motive power; PROVIDED, that no street railway within the incorporate limits of any incorporated town or city shall be constructed without the consent of the corporate authorities where they shall be located; PROVIDED, that all such street railroad companies, so incorporated under general law aforesaid, shall be subject to have and shall be liable for street paving and to other regulations by municipal corporations, as are street railroads and street railroad companies incorporated by separate Act or Acts by the law of this State and of municipal corporations respectively in this State; AND PROVIDED FURTHER, that when any street railroad company, by incorporation or otherwise, under general law as aforesaid, succeeds by purchase or such incorporation to the franchise or road of any other or former company or road, such successor company shall be liable for and shall carry out and discharge any and all obligations of such former company or road, as to schedule, line or route as such former company was liable for or subject to.

Section II. Be it further enacted, That all laws and parts of laws in conflict with this Act are hereby repealed.

Approved August 31, 1891.

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Supreme Court of the United States

October Term, 1916

No. 547

Rome Railway & Light Co., Appellant

VERSUS

Floyd County, et al., Appellees.

Supplemental and Reply Brief of Counsel for Appellees

May it Please the Court:

We desire to submit to the Court in reply to the briefs of Counsel for Appellant, the following:

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED AND BILL WAS PROPERLY DISMISSED FOR WANT OF JURISDICTION IN THE FEDERAL COURTS.

The original brief filed in this case by counsel for appellant is based upon the unqualified assumption that the right to repeal, alter, amend, or otherwise change the franchise rights of the Railway Company, was not reserved. In our brief heretofore filed, we have shown that this power was expressly reserved in the charter itself of the corporation, as well as by the Constitution and statute law of the state of Georgia.

In their reply brief, copy of which has just been furnished us, counsel for appellant now concede this reservation of such a power, but contend that it is limited by the provision of the Georgia Constitution Article One, Section Three, Paragraph Three (Georgia Code of 1911, Section 6390) which provides:

> "No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or merits of the incorporation."

We respectfully submit that the unquestioned reservation of such a power, as is now conceded, removes every federal question involved, and that the appeal in this case should be dismissed for want of jurisdiction in the Federal Courts.

The statute law of Georgia reserving the right to withdraw the franchise of a corporation, unless such right is expressly negatived in the charter, has been in force for a great many years, and was in force prior to the adoption of the Constitution of 1877. The Supreme Court of Georgia, in several cases, has distinctly held that this reservation entered into and formed a part of the charter of every corporation.

West End & Atlanta Street R. R. Co.

—vs—

Atlanta Street Railroad Company

49 Ga., page 151

In this case the Supreme Court of Georgia, in considering the effect of the statute law of the State on the charter of a street railway corporation, said:

> "The Code took effect on the 1st day of January, 1863, and the 1681st section thereof declares, that 'In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter.' This section of the Code introduced a new element into the law of private corporations in this State, and all charters granted by the State to private corporations since its adoption, are subject to its provisions.
>
> When the company accepted the grant made by the General Assembly, it did so with a full knowledge of this general law, as much so as if it had been inserted in the Act incorporating the company, and it is a well established rule that the laws which exist at the time and place of the making of a contract, enter into and form a part of it. The complainant's company, therefore, accepted the charter, subject to the right of the State to withdraw, modify or restrict the franchise granted to it whenever the State should think proper to do so. The power to withdraw the entire franchise granted, necessarily includes the power to modify it, or to restrict the exercise of it, and the question is, whether the General Assembly, by the passage of the Act of 1872, has modified or restricted the complainant's franchise claimed under the Act of 1866, even if it was exclusive, to construct and use street railroads in all the streets of the city of Atlanta for thirty years?

> The grant to the defendant's company to construct and use street railroads in the streets of the city is directly repugnant to, and inconsistent with, the grant to the complainant's company to have the exclusive right to construct and use street railroads in all of the streets of the city, and if the complainant's company did have the exclusive franchise, as claimed under the Act of 1866, that exclusive franchise is modified or restricted pro tanto, by necessary implication, by the Act of 1872."

Central R. R. & Banking Company

—vs—

State of Georgia,
54 Ga., Rep. page 401.

In this case, the Court had under consideration the question of whether or not the grant of exemption from taxation, provided for in the Company's charter of 1835, and subsequently referred to in the Act of 1872 as one of the privileges and immunities granted to the Company, is such an executed contract between the State and the Company, the obligation of which the State can not impair by withdrawing the franchise granted. The Court, on page 409, says:

> "By the general law of the state, at the time the charter of August, 1872, was granted by the General Assembly, consolidating the two companies, and at the time of its acceptance, the State had reserved the right, by her public law, to withdraw the franchise granted, unless such right to withdraw had been expressly negatived in the charter." * * "It may be conceded that the company, under its charter of 1872, had as one of its franchises, granted to it by the state, the right to be exempted from the payment of a higher tax than one-half of one per cent. upon its

> annual net income; still, the state reserved the right (whether wisely or unwisely, is not a question for the Courts to decide) to withdraw that franchise whenever in her judgment, the public interest required it, without impairing the obligation of her contract with the company, as prohibited by the constitution, for the reason that the company accepted the grant upon that condition; that was a part of the contract between the state and the company when it accepted the grant."

Atlantic & Gulf R. R. Co. vs. Georgia, 98 U. S., 359.

In this case, this Court had under consideration the two sections of the Georgia statutes relied on by us, and in discussing those sections, said:

> "It necessarily follows that the new company held the rights granted to it under and subject to the law as it was when the new charter was granted. And the Code of the State, which came of force on the 1st of Jan., 1863, before the charter was granted, contained the following provision:
>
> 'Section 1051. Persons are either natural or artificial. The latter are creatures of the law, and, except so far as the law forbids it, subject to be changed, modified or destroyed at the will of the creator; they are called corporations.'
>
> 'Section 1082. In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter.'
>
> No such right was negatived in the charter granted to the plaintiffs in error. Consequently the franchise was held subject to a power in the State to withdraw it, and subject to be changed, modified or destroyed at the will of its grantor or creator. These provisions of the Code became,

> in substance, a part of the charter. R. R. Co. vs. Maine, 96 U. S., 499, 24 L. ed., 836. It is quite too narrow a definition of the word 'franchise," used in this statute, to hold it as meaning only the right to be a corporation. The word is generic, covering all the rights granted by the Legislature. As the greater power includes every less power which is a part of it, the right to withdraw a franchise must authorize a withdrawal of every or any right or privilege which is a part of the franchise. So it was held in R. R. & Bkg. Co. vs. Georgia, 54 Ga., 401, and so it must be held now, especially in view of the statutory provisions of the Code that private corporations are subject to be changed, modified or destroyed at the will of their creator. Hence the exemption from taxation, except to the extent and in the mode designated in the charter, could be withdrawn without any violation of the State's contract with the Company, and the Act of 1874 was such a withdrawal."

The decisions above referred to were prior to the adoption of the Constitution of 1877. That Constitution provides, in Article One, Section Three, Paragraph Two, (Georgia Code of 1911, Section 6389,) as follows:

> "No bill of attainment, ex post facto law, retro-active law or law impairing the obligation of contracts, or making irrevocable grants of special priveleges or immunities, shall be passed."

It also provides in paragraph three of the same Article and Section that:

> 'No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation."

As above pointed out, both the Supreme Court of Georgia and this Court have definitely decided that the State of Georgia has the right to change, modify or destroy, at will, any power, privilege or right granted to a Railroad or street railway corporation.

The effect of the provision of the Constitution of 1877 is not to take away the right to change or modify a special privilege granted to a corporation, but is merely a limitation on the manner of exercising that right.

We respectfully submit that this Section of the Constitution is applicable only where the reservation provided for under the general law of the State, is relied upon, and does not, in any way, limit or restrict the right to withdraw, change or modify a franchise, where that right is expressly reserved in the franchise granted to the corporation, and which is relied upon as constituting a contract between the parties. We have already pointed out, in the original brief filed by us in this case, that such a reservation is contained in appellant's charter. To make this section of the Constitution, in the face of such express reservation, applicable, would be to deny the County the equal protection of the laws, and would impair the obligation of its contract.

But, even if this constitutional provision is considered as applicable, the sole question is whether or not the right to change, modify or withdraw the charter, in whole or in part, has been exercised in such a manner as to work an injustice to the corporation, and that raises no federal question whatever, but is a matter which could and should have been litigated in the Courts of the State of Georgia, involving as it does only a question of the construction and application of a Section of the State Constitution.

This Court has several times held that where the charter of a corporation is subject to repeal, alteration and amendment, the averments in a bill, that the exercise of such a right took away the property of the corporation without due process of law, and impaired the obligation of the Company's contract, are so devoid of merit as to be insufficient to sustain the jurisdiction of the Federal Courts.

Newburyport Water Works Co. vs. City of Newburyport, 193 U. S., 565.

Owensboro vs. Owensboro Water Works Company, 191 U. S., 358.

Gloucester Water Supply Company vs. City of Gloucester, 193 U. S., 580.

As to applications of the rule in similar cases, where the Court dismissed the appeal for want of jurisdiction in the Federal Courts, although there were averments in the Bill that the Constitution of the United States had been violated, see

Ennis Water Works vs. Ennis, 233 U. S., 652.

Manhattan Life Insurance Company vs. Cohen, 234 U. S., 123.

Defiance Water Works Company vs. Defiance, 191 U. S., 184.

Adirondack Railroad Company vs. New York State, 176 U. S., 335.

We respectfully submit to the Court that the questions raised in this Bill, seeking to confer jurisdiction upon the Federal Court, are so unsubstantial, and lacking in merit, that the appeal should be dismissed for want of jurisdiction in the Federal Courts. Such, in effect, was the decision of the Court below.

APPELLANT HAS NO VESTED OR CONTRACT RIGHTS TO CROSS THE BRIDGES IN QUESTION.

Appellant claims that such rights exist under its charter together with the amendments thereto, and sets forth, as part of its charter, (Record, page 15) the amendment enacted September 21st, 1887 (Appendix to Appellee's brief, page 9), which places the appellant's right and tenure on the bridges under the control of the County authorities; and the amendment enacted November 12th, 1889, (Appendix to Appellee's original brief, page 12), which provides that the appellant shall not go on the bridges at all except by the unanimous consent of all the County Commissioners in regular meeting and expressed by formal resolution, and absolutely prohibits the County authorities from granting appellant or any other person the vested and contract rights contended for in Appellant's Bill.

Inasmuch as Appellant does not attack or seek to set aside the two amendments referred to, but on the contrary, expressly adopts and pleads both amendments, as constituting a part of its charter, it is thereby estopped from denying either the validity or force thereof.

In the decision of the Georgia Supreme Court, Floyd County, vs. Rome Street Railway Company, 77th Ga., 614, so confidently relied upon by Counsel for Appellant, the amendments cited were not involved. They had not even been adopted at that time by the Legislature. While that decision recognized the appellant, in the absence of legislative action, as having a contract right or license to cross one bridge, it also recognized that right as revokable by the authority granting the right, i. e. the State Legislature; and in the case of City Electric R. R. Co. vs. County, cited, the same Court held that the Appellant had surrendered the contract set forth in the record, page 17.

that right by entering into

Appellant had never constructed a line or operated a car on either the Fifth Avenue or Broad Street bridges when these amendments were passed and did not construct its lines or operate over these bridges until after the making of the contract set forth in the Record on page 17. In making this contract, it distinctly recognized the two amendments, referred to as limiting its rights upon all three of the bridges, and the Supreme Court of Georgia held that the Company thereby lost all vested or contract rights and was estopped from claiming any such rights.

City Electric R. R. Co. vs. Floyd County, 115 Ga., page 655.

It appears, therefore, that the Appellant has no such vested or contract right on and over these bridges as to authorize it to revoke the protection of the Federal Constitution.

If no such contract rights exist, then the finding must necessarily be against the Appellant.

THE ACT IN QUESTION IS VALID AS AN EXERCISE OF THE POLICE POWER.

In view of the admission by Appellant in the reply brief that it is under an obligation to the public to render adequate and satisfactory service, we desire to emphasize this point. The public welfare and public convenience require that Appellant's line should be connected, and an Act requiring the Company to build its own bridges for that purpose would be valid. Certainly an Act requiring the payment of one-third the cost of such bridges, or giving the Company an opportunity to use the bridges upon the payment of such sum, would be valid.

If the Appellant had the contract rights claimed by it, then such rights are held subject to the police powers of the State and are subject to be modified or annulled whenever the public safety, public welfare or public convenience demand it.

Chicago B. & Q. R. R. Co. vs. Neb., 170th U. S., pages 57-76.

Public corporations cannot contract with each other upon a subject involving public safety and convenience, so as to withdraw such subjects from the reach of the police power, and thereby substitute their views of the public necessities for those of the Legislature. This subject has been so often considered by this Court that it seems needless to here enlarge upon it.

Chicago B. & Q. R. R. Co. vs. Neb., 170th U. S., p. 57-76.
New Orleans Light Co. vs. La. Light & Heat P. & M. Co., 115 U. S., 650.

Mugler vs. Kansas, 123 U. S., page 623.

The contention of the Appellant that the fixing of the proportion of the costs of the bridges at one-third is arbitrary and unreasonable, and that the fixing of said proportion was left to the County Commissioners is fully answered against Appellant in the case cited of Chicago B. & Q. R. R.

Co., vs. Neb., 170th U. S., p. 76, in the following language:

> "Again, it is said that the apportionment made by the ordinance of the extent of the repairs, one-third to plaintiff in error, and two-thirds to Union Pacific R. R. Co., was arbitrary, without notice, and contrary to plain principles of justice and equity.
>
> But, if, as we have seen, it would have been competent for the Legislature to have put the burden of these repairs upon one of the parties, or to have apportioned them among the parties, as it saw fit, so it may make due apportionment through the instrumentality of the city council. The latter was not directed to proceed judicially, but to exercise a legally delegated discretion."

Attention is also called to the decision, cited in our original brief, of Mo. Pac. R. Co. vs. Omaha, 235 U. S., 121, wherein the Company was required to pay the entire costs of constructing the viaduct, and to the case also cited of C. M. & St. P. R. Co. vs. Minneapolis, 232 U. S., 403, wherein the entire expense of building the bridge, according to plans furnished by the city, was charged against the Company.

The police power of the state embraces regulations designed to promote the public convenience or general prosperity, as well as those designed to promote the public health, morals or safety.

Chicago B. & Q. R. Co. vs. Ill., ex rel. Grimwood, 200 U. S., 561.

The imposition upon a Railway Company of the entire cost of removing and rebuilding a railway bridge and culvert made necessary by the proposed widening and deepening of the channel of a creek by Drainage Commissioners, acting under authority of the State Legislature, does not violate the due process clause or the equal protection of the laws clause of the Federal Constitution.

Chicago B. & Q. R. Co. vs. Ill. ex. rel. Grimwood, supra.

When corporations created for public purposes, such as railroad companies, enter into contracts affecting the safety and welfare of the public, the presumption is that they do so with the knowledge that their agreements cannot withdraw such subjects from the police power of the state, and hence such contracts are not necessarily protected by the Federal Constitution from subsequent state legislation MODIFYING or ANNULLING their provisions; and a contract between a city and a railroad company for sharing the expense of maintaining and repairing a viaduct carrying a street over the railroad tracks is one affecting the safety of the community, and the subject matter is in the police power of the state, so that it may by a subsequent statute impose greater burdens upon the company without violating the contract clause of the Federal Constitution.

Chicago B. & Q. R. Co. vs. Nebraska, 170 U. S., pp.57-76.

In the foregoing case, the City and the Railroad Company had entered into a written contract apportioning the cost of maintaining and repairing this viaduct, and as between themselves, fixing the portion to be borne by each. The Legislature enacted a law which changed this proportion and placed a much heavier burden upon the railroad company than that imposed by the agreement, and the company contended that the legislative act impaired the obligation of its contract with the city, and was, therefore, void. This contention was overruled, as set out above.

In the exercise of the police powers of the State, neither due process of law nor the equal protection of the laws is denied a street railway company by an order of the Commissioners of Railroads made and issued under a State legislative act requiring such street railway to pay one-half the expense of constructing and maintaining a safety appliance at a grade crossing of a steam railroad which was not built until after the street railway had been constructed.

Detroit, Ft. Wayne & Belle Isle R. Co. vs. Osborn, 189 U. S., p. 383.

In the case cited in our original brief, of Missouri P. R. Co. vs. Omaha, 235 U. S., page 121, a steam railroad was required to build, at its own expense, a viaduct sufficient to carry a street railway company over its tracks, and in passing on that case, this Court used the following language: "It may be that it would be more fair and equitable to require the street railway company to share in the expense of the viaduct, and if the municipality had been authorized to do so by competent authority, it would have been a constitutional exercise of the police power to have made such division of expense." Citing Detroit, Ft. W. & B. I. R. Co. vs. Omaha, supra.

PROVISIONS OF ACT OF AUGUST 15, 1914, NOT UNJUST TO APPELLANT, OR ITS CREDITORS.

Counsel for appellant, in their briefs, insist that the charter of the company constitutes a contract. This grant of the charter by the State was entirely gratuitious, but appellant contends, in its reply brief, that the acceptance of this charter imposes upon it the obligation of serving the public in all parts of the City of Rome. If this contention is correct, and that obligation is thereby imposed upon the Railway Company, then it would be within the power of the State Legislature, or of the Railroad Commission of the State, having jurisdiction in such matters, to compel appellant to construct and maintain bridges of its own across the rivers in order that it may adequately serve the public and fulfill its duties thus assumed. Instead, however, of saying to the Company that it must build bridges independently and at its own expense in order to serve the public, provision is made to avoid such a heavy expense by allowing complainant to use the bridges erected by the County upon the payment of one-third of the cost thereof. We respectfully submit that instead of being unjust to the complainant, its corporators or creditors, this provision is exceedingly just and saves the Company the enormous expense of erecting its own bridges.

The contention is made in the briefs for appellant, that this act of the legislature dismembers the street railway company. We submit that any such contention is unfounded in fact. On the contrary, the company's lines are dismembered by the rivers put there by nature, and when it accepted the franchise granted it, it assumed the burden of providing means of crossing these rivers. There is no provision in its charter, and there is no provision of law requiring the County of Floyd to erect bridges across these rivers in order that the company's lines may be joined. That is the company's burden, and as stated above, the provision allowing it to cross the County's bridges by paying only one-third of the expense thereof, is exceedingly just in the face of the contention and the admission on the part of appellant, that it is under a public duty to connect its lines and thus serve the public adequately.

Under the decisions of the Court and of the Supreme Court of Georgia, hereinbefore cited, in discussing the jurisdiction of the Federal Court in this matter, it appears very clearly that the only questions in this case are whether or not the section of the Georgia Constitution providing that no grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to the corporators or creditors of the corporation, applies, and if it does apply, alter, or repeal the charter of the complainant in amend, alter, or repeal the charter of the complainant in such a manner as to work an injustice to its corporators or creditors.

We insist that this section of the Constitution applies only in cases where the right to revoke, alter or amend, rests solely on the general law of the State, and that it does not apply in this case for the reason that the right to revoke, alter or amend, is expressly reserved by the State in the Acts which complainant relies on as constituting its franchise. It is contended by Counsel for Appellant that those Acts constitute a contract. If so, then the right to revoke, alter or amend, is as much a part of that express contract as is the grant of the franchise itself, and the Company cannot now be heard to complain when the State sees fit to take advantage of that reservation. In our original brief already filed, we have called attention to several cases in which this Court ruled that where such a reservation was expressly made in the franchise the corporation took the franchise subject to such a right of revocation, and that the State had the power to exercise it even though it might entail serious loss upon the corporation.

If, however, this Court should hold that provision in the Constitution of Georgia, has any application under the facts of this case, then we submit that the decision of the Supreme Court of Georgia, in the case of Macon & Birmingham Railroad Company vs. Gibson, 85th Ga., p. 1, is controlling. In that case it appears that the Legislature of Georgia, by a charter granted to the railroad corporation in 1888 gave it power to locate and construct its road where it thought proper; that in accordance with this power the company proceeded to locate its line of railroad through the various counties named, including Upson County; that on April 2nd, 1889, the railroad company entered into a contract with a construction company for the construction and equipment of the entire road over the line adopted by the railroad company; that the railroad company caused various lines to be run through the county of Upson with a view to adopting the one which should appear to be the most direct and practicable line; that a line was adopted and the location made prior to October 21st, 1889, on which day a contract was entered into by the construction company and certain parties, for clearing, grubbing, excavation, and for removing loose and solid rock for a distance of seventy-five miles, including the work through Upson County, on the line adopted and located. On November 7th, 1889, the charter of the corporation was amended, providing that if the railroad company ran through Upson County, and within five miles of the town of Thomaston, it should run into and through the corporate limits of that town, or within one mile of the Court House. There were also provisions that if there was any difference in cost those questions should be arbitrated and the differences, if any, paid by the town of Thomaston or the citizens thereof. The company refused to accept this amendment to its charter, and some of the citizens offering to comply on their part with the provisions of this amendment, insisted upon compliance by the company. The railroad company insisted upon the same provision of the Constitution of 1877, which is now relied upon, and showed that it had already gone to great expense and trouble incident to the location of the route, the letting of contracts for the clearing up of a right-of-way and the construction of the road. The Court in passing upon this contention, on page 16, and in discussing the right to revoke special privileges or immunities, says: "Whether a mode adopted by the Legislature in a given instance is just in this respect or not, whilst primarily a legislative question, may, if palpably decided wrong, become a judicial question," and further says that the Legislature had this right in the instant case "wholly irrespective of the comparative cost of two or more routes;" and further says that "to require this to be done on the further condition that any increased cost should be provided for and paid by others, was giving the company a gratuitious, rather than a necessary measure of justice."

Under this decision we submit that the question of the amount which the complainant should pay for the use of these bridges, if they see fit to use them at all, has been fixed by the Legislature, and the Act of August 15th, 1914, provides that if the Company avails itself of the right to use these bridges it must comply with the reasonable conditions imposed by the Board of Commissioners, and the terms of this Act." There is a prima facie presumption that the amount thus fixed is not unjust to the corporation or its creditors, and the burden is on the complainant to show in its bill of complaint that the action of the Legislature is palpably wrong and unjust. We submit that the case as made by the bill of complaint is wholly insufficient.

Equity Rule 25, requires a statement of the ultimate facts upon which the plaintiff asks relief. An examination of the bill of complaint fails entirely to show the ultimate facts upon which the complainant relies, but the averments thereof are a series of bare, naked assertions to the effect that the complainant has not the money to pay its proportionate part of the costs of these bridges, and that it isn't able to borrow the money, and that under present conditions it is unable to make the money. The bill does show that it has outstanding, large issues of bonds and stock, and no complaint is made that it has defaulted in the payment of interest on those bonds, or any payment of a dividend on the stock. There is no averment as to the value of its holdings, the income of the Company, its expenses, or anything of that kind, and there is no allegation of fact showing any decrease in the income of the Company on account of not being able to use the bridges. The averments of the bill make no question for judicial determination.

Respectfully submitted,

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Solicitors for Appellee.

ROME RAILWAY & LIGHT COMPANY *v.* FLOYD COUNTY, GEORGIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 547. Argued January 25, 1917.—Decided March 6, 1917.

A street railway company in Georgia, under special acts of the legislature, claimed a perpetual and unconditional franchise right to operate over certain county bridges irrespective of the county's consent. The claim being disputed by the county, the company entered into and fully acted upon certain written agreements with the county purporting to be grants by the county to the company of the right to lay, maintain and operate tracks over the bridges upon certain conditions, including payment to the county for the use of the bridges, the county being governed in the transactions by a statute which limited its power to the granting of temporary uses and privileges subject at all times to revocation. *Held*, partly on the authority of *City Electric Ry. Co.* v. *Floyd County*, 115 Georgia, 655, that whatever may have been the rights of the company originally, the effect of the compromise agreements, and their execution, was to substitute a temporary grant subject at all times to revocation.

By act of the Georgia legislature (August 15, 1914, Laws 1914, p. 271), Floyd County was authorized to reconstruct the old bridges in Rome, Georgia, requiring, in so doing, the removal of street railway tracks; to grant franchises to operate over new bridges and fix the terms thereof including, as a condition precedent, that the grantee pay one-third of the cost of construction. The act, however, provides that "any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the" county authorities and the terms of the act. *Held*, that a company which had in effect surrendered its franchise right to use the old bridges in exchange for a temporary grant revocable at the will of the county authorities, could not enjoin them from proceeding under the act to rebuild the bridges and charge the company one-third of the cost as a condition precedent to its use of the new structures.

228 Fed. Rep. 775, affirmed.

THE case is stated in the opinion.

Mr. John C. Doolan, with whom *Mr. Linton A. Dean*, *Mr. J. Ed. Dean*, *Mr. Edmund F. Trabue* and *Mr. Attilla Cox, Jr.*, were on the briefs, for appellant.

Mr. George E. Maddox, with whom *Mr. Joel Branham* and *Mr. Mark B. Eubanks* were on the briefs, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Within the limits of Rome, Georgia, since 1881, three public bridges have crossed the Etowah and Oostanaula Rivers. Appellant is successor to the Rome Street Rail-Road Company incorporated in 1884 by special act and empowered to construct and operate railroads in that city, also in certain neighboring towns, and, with consent of the Floyd County Board of Commissioners of Roads and

Revenues, for five miles along public roads. Ga. Laws, 1884–5, p. 191, *Id.* p. 235. Authority was given to use horses, electricity, underground cables driven by steam, "or any other appliance that may hereafter be invented or used as motive power." The company began to run horse drawn cars over the city streets and across Howard Street or Second Avenue Bridge as early as 1885; and this mode of operation continued until 1892 or 1893.

The Howard Street Bridge having been destroyed in April, 1886, the county erected a new one upon the same site; thereafter it refused to permit the car company to lay tracks or operate over this without payment therefor and brought suit to enjoin any attempt so to do. In *County of Floyd* v. *Rome Street Railroad Co.*, 77 Georgia, 614, 617 (October Term, 1886), the state Supreme Court held: "The only question made by the record, therefore, is, whether the legislature has authorized the street railroad company to appropriate this bridge to its use in the manner claimed by it, without the county's consent, and without making it compensation. . . . The bridge forms a continuation of the streets of the city across the river and is a part of the same. . . . The legislature, unless restricted by the State constitution, may, even without the consent of a municipality, and without allowing it compensation, authorize railroads to be laid in its highways. . . . But even had the consent of the county of Floyd been required to this use of the bridge by the street railroad company, that assent was given, and when the condition on which it was accorded was accepted and acted upon by the company, it became a binding contract until the license was revoked by the only authority having power to revoke it. . . . The precise point insisted upon by counsel for the county is, that where any part of a public street or highway is washed out or otherwise destroyed by any means, and the damage is repaired by a new structure upon the portion thus destroyed or rendered unfit for use, this gives the county a right to exact additional compensation from a railroad company which, previously to the injury, used the street or public highway with the assent of the municipality, where the railroad company proposes to make the same use of the street or highway after it has been repaired. We certainly know of no case which has carried the right of compensation for its use to this extent, and think that its recognition and enforcement by the courts would work great injury to the prosperity of the community."

An amendment to its charter, September 21, 1887 (Ga. Laws, 1887, p. 148), empowered the company to use dummy steam engines on the bridges subject to such regulations as the Board of Commissioners might prescribe from time to time. Extensions were also specially authorized with consent of the Board as to public roads and town authorities as to streets. Another amendment, November 12, 1889 (Ga. Laws, 1889, p. 696), prohibited the use of dummy engines or steam power on the bridges without unanimous consent of all the Commissioners declared by public resolution in an official meeting, and it provided, "that the Board of Commissioners of Roads and Revenues of Floyd county shall not have the right to grant any vested or contract rights to said Rome Street Railroad Company, or any other persons on or over said bridges, but may, in their discretion, grant temporary uses and privileges to said railroad company over said bridges, subject at all times to be revoked by said commissioners."

February 25, 1892, Floyd County, through its Board of Commissioners, and the Rome Street Railroad Company by formal writing agreed that, "Said party of the first part grants to the said party of the second part the right to lay and maintain a single track on one side of the County Bridges, at Rome, to-wit, . . . with the right to place electric wires and appliances and to run electric cars across said bridges upon the consideration and conditions herein named"—among them payment of $100.00 annually for use of each bridge, and commencing to build electric lines within ninety days. Later, in 1892 or 1893, the car lines were equipped electrically and extended over and beyond all of the bridges, and since that time have been continuously operated. February 3, 1896, it was stipulated by the county and the City Electric Railway Company, a successor to the Rome Street Railroad Company and appellant's predecessor, "that said party of the first part grants to the said party of the second part the right to use its electric wires and appliances and to run electric cars across the Floyd County Bridges. . . . Said company shall pay annually to said party of the first part the sum of $200.00 for the use of said bridges in consideration of the grant herein named."

In *City Electric Railway Company* v. *Floyd County*, 115 Ga. 655, 657 (March Term, 1902), the state Supreme Court sustained the agreement of February 25, 1892. It said: "If the railroad company originally had the right, under the power granted to it by the legislature, as we are inclined to think it had, to construct and operate its electric lines over the bridges in question, without the consent of the county and without paying anything whatever therefor, it lost this right when the dispute between it and the county was compromised and settled by the execution of this contract. If there had been no controversy between the parties as to their respective rights in the matter, and the county had simply charged the railroad company one hundred dollars per annum for the use of each of the bridges, and the company had simply agreed to pay this sum annually, the contract entered into might have been, as contended by the plaintiff in error, a *nudum pactum*, and, therefore, not binding upon the company. But this was not the case; the parties asserted conflicting claims, depending upon a question of law, and these claims were compromised and settled by the contract now under consideration."

An Act of the Georgia Legislature, approved August 15, 1914 (Ga. Laws, 1914, p. 271), provides:

That all right, title and interest in the Rome bridges together with complete jurisdiction and control over them shall be vested in Floyd County to be exercised by its authorities. All permits and franchises theretofore granted by State, county or city to any street railroad company to lay tracks or operate cars over any one of the bridges are revoked and repealed "so far as the same applies to any future bridges hereafter constructed under this or any other law, unless the said companies will conform to the reasonable terms and conditions required by the county authorities"; and Floyd County is authorized to condemn and remove existing bridges and construct new ones. The street railway company upon notice shall remove its tracks as may be required by the county authorities; the latter are given exclusive right and jurisdiction to grant franchises to operate over new bridges and to prescribe terms for such grants; and they are authorized to require as a condition precedent that any grantee shall pay to the county "one-third of the actual cost of the building of said bridges . . . but any corporation now having a franchise shall have the right to use any new bridge upon complying with the reasonable conditions imposed by the board of commissioners and the terms of this Act." The validity of any part of the act shall be contested only by injunction proceedings before the work of tearing down and removing the bridges is begun.

The Commissioners of Floyd County gave public notice, May 3, 1915, that on June 16th they would begin the work of tearing down old and rebuilding new bridges at an estimated total cost of $260,000.00. Ten days later they passed resolutions wherein, after referring to the Act of August 15, 1914, and reciting their determination to remove the old bridges and erect others, they declared that appellant would be required to pay one-third of the actual cost of removing the old bridges and erecting new ones, "which sum shall be paid to the County Treasurer before said Company shall be allowed to place any tracks, wires, equipment or operate any cars on and over" the new structures.

By its original bill, filed May 26, 1915, in the United States District Court, appellant sought to enjoin defendants from undertaking to enforce the Act of 1914 according to their declared purpose upon the ground (a) that such action would deprive it of property without due process of law and of the equal protection of the laws, and impair the obligation of contracts with the State, contrary to the Constitution of the United States; (b) that when properly construed the Act of 1914 does not authorize defendants to require appellant to pay one-third of the cost of removing old bridges and constructing others, such charge being permitted only in the absence of a then existing franchise to cross the former.

Being of opinion that nothing in acts of the legislature, ordinances or resolutions gave appellant "any such vested interests, or such right to occupy and use these bridges" as it claimed, upon motion, the trial judge dismissed the bill. The judgment is correct and must be affirmed.

It is unnecessary now definitely to determine what rights were conferred by the Act of 1884. Under the agreements of 1892 and 1896 between appellant's predecessors and the Board of Commissioners the former accepted a temporary grant subject at all times to revocation—all the latter was empowered to make by the Act of 1889. This, we think, is clearly true and it is also but the logical result of what the Supreme Court of Georgia held in *City Electric Ry. Co.* v. *Floyd County, supra.* And see *West End & Atlanta Street R. R. Co.* v. *Atlanta Street R. R. Co.*, 49 Georgia, 151, 158.

Considering the entire Act of 1914 we are unable to conclude that the legislature did not intend to authorize the county authorities to require appellant to pay "a sum equal to one-third of the actual cost of the building of said bridges" before being allowed to use the same.

Affirmed.